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CIVIL PROCEDURE REPORTS.

CONTAINING CASES UNDER THE

CODE OF CIVIL PROCEDURE

AND

THE GENERAL CIVIL PRACTICE

OF THE

STATE OF NEW YORK.

REPORTED WITH NOTES

BY

HENRY H. BROWNE
OF THE NEW YORK BAR.

WITH A REFERENCE TO THE SECTIONS OF THE CODE OF CIVIL PROCEDURE CONSTRUED OR CITED IN THE OPINIONS CONTAINED IN THE FOLLOWING REPORTS, ISSUED DURING THE PERIOD COVERED BY THIS VOLUME: NEW YORK REPORTS, VOL. 99; HUN'S REPORTS, VOLS. 36 AND 37; ABBOTT'S NEW CASES, VOL. 16; HOWARD'S PR. VOL. 2 N. S.; DEMAREST'S SURROGATES' REPORTS, VOL. 3; AND N. Y. CIVIL PROCEDURE REPORTS, VOL. 8.

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3228, subd. 3. Lablache *v.* Kirkpatrick..... 8 N. Y. Civ. Pro. 341.
3228, subd. 3. Feeney *v.* Brooklyn City R. R. Co. 36 Hun, 197.
3228, subd. 3. Hayes *v.* O'Reilly..... 8 N. Y. Civ. Pro. 347.
3229 Krafft *v.* Wilson..... 8 N. Y. Civ. Pro. 359.
3229 Moffett *v.* Deom..... 8 N. Y. Civ. Pro. 85.
3230 Smith *v.* Green..... 8 N. Y. Civ. Pro. 163.
3230 Couch *v.* Millard..... 8 N. Y. Civ. Pro. 431.
3234 Coon *v.* Diefendorf..... 8 N. Y. Civ. Pro. 293.
3234 Ackerman *v.* De Lude..... 36 Hun, 44.
3234 Kingburn *v.* Lowe..... 37 Hun, 237.

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3240 Walsh *v.* Van Allen..... 36 Hun, 629.
3246 Overheiser *v.* Morehouse..... 8 N. Y. Civ. Pro. 11.
3247 Olmstead *v.* Keyes..... 2 How. N. S. 1.
3251, subd. 3 Kenney *v.* First National Bank of Pittsburg..... 8 N. Y. Civ. Pro. 399.
3251 Bank of Mobile *v.* Phœnix Ins. Co..... 8 N. Y. Civ. Pro. 212.
3252 Fetchman *v.* Davenport..... 8 N. Y. Civ. Pro. 220.
3252 Clegg *v.* Aiken..... 8 N. Y. Civ. Pro. 249.
3252 Burkhart *v.* Babcock..... 2 How. N. S. 512.
3253 Couch *v.* Millard..... 8 N. Y. Civ. Pro. 431.
3253 Bank of Mobile *v.* Phœnix Ins. Co..... 8 N. Y. Civ. Pro. 212.
3253 Pool *v.* Osborn..... 8 N. Y. Civ. Pro. 232.
3253 Lyon *v.* Betchford..... 8 N. Y. Civ. Pro. 229.
3253 Mingay *v.* Holly M'f'g. Co..... 99 N. Y. 270.
3256 Bank of Mobile *v.* Phœnix Ins. Co..... 8 N. Y. Civ. Pro. 212.
3256 Clegg *v.* Aiken..... 8 N. Y. Civ. Pro. 249.
3262 Fetchman *v.* Davenport..... 8 N. Y. Civ. Pro. 220.
3268 Wyckoff *v.* Devlin..... 8 N. Y. Civ. Pro. 138.
3271 Matter of Martin..... 2 How. N. S. 26.
3323 Sayles *v.* Murphy..... 8 N. Y. Civ. Pro. 325.
3324 Sayles *v.* Murphy..... 8 N. Y. Civ. Pro. 325.
3343 Rosenbaum *v.* Union Pacific Co..... 2 How. N. S. 45.
3347 subd. 11 Republic of Mexico *v.* Ockerhausen..... 37 Hun, 533.
Chapter 17, title 3. King *v.* Flynn..... 37 Hun, 329.
Chapter 18, title 5. Long *v.* Olmstead..... 3 Dem. 581.

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CIVIL PROCEDURE REPORTS.

THOMAS, AS EXECUTRIX, &C., OF THOMAS, DECEASED, APPELLANT, *v.* THE NEW YORK LIFE INSURANCE COMPANY, RESPONDENT.

COURT OF APPEALS, JUNE, 1885.

§ 1317.

Appeal. — When new trial should be ordered on, and not a modification of the judgment.

Where a judgment is held erroneous on appeal, and the character of the issues framed by the pleadings is such that upon a new trial it would be possible for the party defeated on the appeal to recover, such new trial should be awarded.

Where, in an action for conversion, tried by the court without a jury, facts were found from which was deduced the legal conclusion that the plaintiff was entitled to judgment for $400, and the general term on appeal ruled that the proper legal conclusion from such facts should have been a judgment for nominal damages only, and modified the judgment accordingly, and the issues were such that it was possible for the plaintiff to recover more than nominal damages,—*Held*, that the general term should have ordered a new trial.

Ehrichs *v.* De Mill (75 *N. Y.* 874), followed. Thomas *v.* N. Y. Life Ins. Co. (50 *N. Y. Super.* (18 *J. & S.*) 225), reversed in part.

(*Decided June* 2, 1885.)

Appeal from a judgment of the general term of the N. Y. superior court, modifying, and affirming as

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modified, a judgment entered upon a trial before the court without a jury, a trial by jury having been waived.

General term opinion reported 50 *N. Y. Super.* (18 *J. & S.*) 225, and digested 19 *N. Y. Weekly Dig.* 335.

The facts are sufficiently stated in the opinion.

W. Bourke Cochran, for appellant.

W. B. Hornblower (*Chamberlain, Carter & Hornblower*, attorneys), for respondent.

FINCH, J.—The appellant here does not complain of the reversal of the judgment by the general term, but of the new judgment rendered by that tribunal, awarding nominal damages only, instead of the $400 recovered by her in the trial court.

The action was for the conversion of certain articles of personal property belonging to Griffith Thomas in his life-time, and claimed by the plaintiff, as executrix of his last will. The complaint alleged her title, demand and refusal; that the property was worth $5,000; and claimed judgment for that amount. The answer denied the conversion, and the valuation put upon the property, and pleaded as an affirmative defense a purchase of the furniture from the plaintiff after the death of her husband and before the issue of letters testamentary, for the sum of $400 paid to her in cash.

The trial court found as facts the ownership of the property by the testator, and that its value was $400; his death; the issue of letters testamentary to plaintiff in July, 1879; the taking of the property by defendant on February 18th of that year, and six days later the execution by plaintiff of a bill of sale and release of furniture to the defendant for the consideration paid of $400 and the discharge and cancellation

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of an alleged debt due from her husband of $5,250, and that when this contract was made the purchaser knew that the seller had not yet received letters testamentary or qualified as executrix. From these facts was deduced the legal conclusion that the plaintiff, as executrix, was entitled to judgment for $400, while the general term ruled, that the proper legal conclusion should have been a judgment for nominal damages only, and drawing that conclusion awarded the corresponding judgment.

The appellant, without criticising the propriety of the reversal by the general term, insists that it should have been followed by an order granting a new trial, and not by a final judgment for six cents damages.

We so held in a precisely similar case (Ehrichs *v.* De Mill, 75 *N. Y.* 374). There the action was tried before a court without a jury, the facts were all found, and without apparent exception or error in the process the trial court drew from them the inference of a judgment for the defendant; the general term, on the contrary, drew an opposite conclusion from the facts found and ordered judgment for the plaintiff, and on appeal to this court while justifying the reversal we determined that a new trial should have been ordered, and that the rendition of final judgment was a mistake. It was then contended, as it is now, that the rule had already been declared to be that where the facts were found by the trial court without exception or error in the process of their determination, and so the only open question was as to the legal inference to be drawn, the appellate court might draw that inference and render judgment accordingly. But the answer made was that in such a case we could not know that there had not been exceptions or asserted errors in the process of finding the fact, since the respondent, not having appealed, was under no obligation to procure their appearance upon the record, and

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might very well have deemed their presence immaterial for any legitimate purpose of the appeal. And the rule was declared to be that wherever the character of the issues framed by the pleading was such that upon a new trial it would be possible for the defeated party to recover, such new trial should be awarded.*

The appellant claims the benefit of that rule, and is entitled to have it enforced. But his adversary contends that even then there could be no recovery for more than the nominal damages awarded, because the contract of sale, although unauthorized when made, was subsequently validated by the after issue to the seller of letters testamentary. Conceding so much for the purpose of the argument, we still cannot say that within the issues the contract may not be attacked for fraud or mistake, or some other reason outside of lack of authority to make it.

* To the same effect: Guernsey v. Miller, 80 *N. Y.* 181; Fox v. Kidd, 77 *Id.* 489; Foot v. Ætna Life Ins. Co., 61 *Id.* 571; Griffin v. Marquardt, 17 *Id.* 28; Cythe v. Fontain, 51 *Barb.* 186; Meyer v. City of Louisville, 7 *Abb. Pr.* 6; and see Astor v. L'Amoreaux, 8 *N. Y.* 107.

Where no possible state of proof applicable to the issues will entitle the respondent to recover, judgment absolute should be rendered on reversal. Eadie v. Simon, 26 *N. Y.* 9; Edmonstone v. McLoud, 16 *Id.* 543; Burkhardt v. McClelland, 15 *Abb. Pr.* 243, *note;* Newell v. Wheeler, 4 *Robt.* 247. So also, where the facts are agreed upon. Cuff v. Dorland, 57 *N. Y.* 560; Petterson v. Walsh, 1 *Daly*, 182.

As to when a judgment may be modified in amount and character or changed in form on appeal, see Coster v. Shipman, 35 *N. Y.* 533; People v. Supervisors of Richmond, 28 *Id.* 112; Fitzhugh v. Wiman, 9 *Id.* 559; Tillou v. Kingston Mutual Life Ins. Co., 5 *Id.* 405; Hayden v. Florence Sewing Machine Co., 5 *Id.* 221; McKeon v. See, 4 *Robt.* 449.

As to when it cannot be reduced, see Whitehead v. Kennedy, 69 *N. Y.* 462, reversing 7 *Hun*, 230; Cassin v. Delaney, 38 *N. Y.* 178; S. C., 6 *Abb. N. S.* 1, reversing S. C., 1 *Daly*, 224; Moffett v. Sackett, 18 *N. Y.* 522; Burling v. Gunther, 63 *How. Pr.* 68; Taule v. Krekeler, 17 *Hun*, 238; Pinney v. Orth, 2 *N. Y. Civ. Pro.* 1; Cromwell v. Burr (No. 2), 9 *Daly*, 482.

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So much of the judgment of the general term as awards judgment for the plaintiff for six cents damages should be reversed and a new trial granted, costs to abide the event.

All concurred.

IN RE SAMUEL J. LOWELL, AN IMPRISONED JUDGMENT DEBTOR.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM, AUGUST, 1885.

§§ 2200 *et seq.*, 2204, 2208.

Judgment debtor.—Discharge of, from imprisonment.—When use of money for support of family, etc., will prevent.—What amount to making over of property for future benefit of self and family.

A judgment debtor, imprisoned by virtue of an execution issued on a judgment for money obtained by him by fraud, who has used such money in maintaining himself and family, knowing that his creditor will thereby be the loser, is deemed to have disposed of such money with intent to defraud the creditor, and cannot be discharged from imprisonment pursuant to sections 2200 *et seq.* of the Code of Civil Procedure.[3,4]

In re Finck (59 *How. Pr.* 145);[1] *In re* Roberts (59 *Id.* 136);[2] followed.

Where a judgment debtor, subsequently to incurring the liability on which the judgment was recovered, obtained a considerable sum of money and invested it in real property in his wife's name, and asserts that he did so for the purpose of repaying to her money which he had received on her account many years before, and used without objection as his own,—*Held*, that this was such a making over of property "for the future benefit of himself and family" as would prevent his discharge from imprisonment under an execution issued on said judgment.[5]

(*Decided August* 18, 1885.)

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In re Luwell.

Application by Samuel J. Lowell, a judgment debtor imprisoned under an execution against his person, for his discharge from imprisonment.

In an action to recover moneys obtained by false and fraudulent representation, one Jason S. Hoffman recovered a judgment against the petitioner, Lowell, on which an execution against the property of the judgment debtor was issued and returned unsatisfied. Thereafter an execution against the person of the petitioner was duly issued, under which he was arrested and imprisoned. He now seeks to be discharged from imprisonment thereunder. It appeared in this proceeding that the money obtained by the judgment creditor had been used by him for the support of himself and family.

Other facts are stated in the opinion.

Jacob Fromme, for petitioner and application.

E. P. Wilder, for judgment creditor, opposed.

VAN HOESEN, J.—In the matter of Finck (59 *How. Pr.* 145), Judge VAN VORST decided that the pro-
[1] ceedings of the imprisoned debtor had not been just and fair, because he had spent upon his family the proceeds of property that had, to his knowledge, been obtained by theft from the judgment creditor. The debtor himself had not committed the theft, but he had been informed of it before he used the avails of the property for the support of his family. The learned judge was of opinion that an imprisoned debtor who knowingly appropriates to his own use the property of which his judgment creditor has been deprived by embezzlement should be deemed guilty of disposing of that property with intent to injure and defraud the creditor, though the use that he makes of

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it would be perfectly innocent if the property were honestly his own. Judge VAN VORST, in giving his [*] opinion, referred with approval to the decision of Judge J. F. DALY in the Roberts case (59 *How. Pr.* 136), in which Judge DALY had given with great clearness and force his construction of the meaning of the words "if the proceedings of the debtor are just and fair."

In the matter of Fowler (8 *Daly*, 548), I followed the decision in the Roberts case, though I said that I thought Judge DALY in the Roberts case had, in some *obiter* observations, misconceived the meaning of the statute.

In my opinion, an imprisoned debtor, who had never received any part of the property that the judgment creditor had lost through larceny and fraud could not be said to have disposed of that property with intent to defraud the creditor. The rule with respect to debtors who had actually received the property of the judgment creditor or its avails, was, in my opinion, different; for a disposition of such property with intent [*] to defraud the creditor might fairly be inferred when the debtor used it for his own purposes, and in such a way as to place it beyond the reach of the creditor. The fraudulent disposition of the property which the law was intended to punish, must take place after the property has passed under the control of the fraudulent debtor. Though the demand upon which judgment was recovered were a debt fraudulently contracted or a claim for damages for deceit, the discharge of the debtor from imprisonment under an execution could not be denied, unless it were shown that he had at some time made away with his property with intent to benefit himself or his family in the future or with intent to injure and defraud the creditor. The property may be disposed of before the judgment creditor knows that he has been defrauded,

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and before he contemplates bringing an action, but in order to bar a discharge, property must be disposed of by the debtor, and that property must be his own.*

In the curious case of Suydam *v.* Belknap (20 *Hun*, 87), the general term of the supreme court held that if a trustee embezzled the trust estate, he acquired no title to it, and consequently it was not his own property that he disposed of when he appropriated the trust fund to his own use; and for this reason they held that a discharge could not be denied to a trustee who had converted the trust estate to his own purposes.† It may be a question whether a thief should be permitted to escape punishment by alleging that he did not acquire a valid legal title to the goods he stole. And it may also be a question as to whether the trustee Belknap did not have a legal title to the estate he held in trust. But, waiving those matters, it seems to follow from the reasoning of the supreme court in Suydam *v.* Belknap, that if Belknap had acquired the title to the property he would not have been discharged, though he had lost the property or spent it before he was arrested, so that it was no longer in his power to surrender it to the judgment creditor.

The difficulty in these cases is to discover the intent with which the debtor has disposed of his property. There is not, in my opinion, a conclusive presumption in all cases that the debtor who obtains property fraudulently has fraudulently disposed of it because he is not able at the time he apples for his discharge to surrender it to his creditor. If, by inevitable accident, or without fault on his part, he has been deprived of the property, it cannot be said that he has disposed of it.

* In Bradford *v.* People (20 *Hun*, 309), it was held that where the ground of a judgment debtor's imprisonment was that he had received and disposed of his property with intent to defraud his creditors, he was not entitled to a discharge.

† See *In re* Caamano, *post* 29.

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But if it appears that he has disposed of the property, the question arises, with what intent? In answering that, we apply the rule that a man intends the obvious consequences of his own acts; and the court must draw its conclusions as to the intent from the facts [*] that are in evidence. If a debtor uses the money that he obtains by fraud in maintaining himself and family, knowing that the creditor must be the loser, may not the courts infer that he disposed of that property with intent to injure and defraud that creditor? Of course, there may be instances that may show that the debtor's intentions in disposing of the property were not dishonest, and that he had no good reason to believe that the creditor would suffer, though the property were disposed of. Such cases may perhaps occur, and when they do the court will deal with them. But the statute ought not to be so construed as to permit the thief and the swindler, after spending fourteen days or ninety days on the jail limits, to snap his fingers at the victim, and say: "It is true that I spent the money of which I defrauded you in getting the luxuries and the necessaries of life, but I have not kept any of it, nor have I made any of it over for my family or myself. The use of your money for my gratification does not prove that I disposed of it with fraudulent intent, and you cannot, if you would, prevent my discharge."

Applying to this case the rule that I think controlling, the discharge must be refused. Lowell obtained Hoffman's money by false pretenses, and spent it, intending that Hoffman should lose it and be injured by the loss.

Again, he received other moneys, which he used in buying property in the name of his wife. He and [*] his wife are residents of New Jersey. They were formerly residents of Massachusetts. Lowell says that in Massachusetts he reduced to possession certain

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moneys that belonged to his wife. Those moneys he used as his own. Years afterwards, he moved to New Jersey, but conducted business in New York. Subsequent to the incurring of his liability to Hoffman, he obtained a considerable sum of money.* This money he invested in New Jersey, in the name of his wife. He says he did so because he wished to repay to her the money that he had received on her account in Massachusetts. I see nothing to warrant the belief that he considered himself his wife's debtor before he determined to invest his suddenly acquired money in her name. He says that his wife sometimes did not know at what times he received the moneys that belonged to her. He took them without objection on her part, and used them as his own. When he invested these moneys in her name he left himself without the means of paying his debts. Such a provision for the wife, under such circumstances, even though the purpose of the husband was to reimburse his wife for money of hers that he had used in supporting her and himself, seems to me to be making over property "for the future benefit of himself and family."

The discharge should be denied.

* A transfer of property with intent to defraud creditors can only be complained of by those who were creditors at the time of such disposition. *In re* Brady, 69 *N. Y.* 215; Matter of Pearce, 29 *Hun*, 270; Coffin v. Gourlay, 20 *Id.* 308.

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OVERHEISER *v.* MOREHOUSE, AS EXECUTOR, ETC., OF MOREHOUSE, DECEASED.

SUPREME COURT, THIRD DEPARTMENT, ULSTER COUNTY, SPECIAL TERM, AUGUST, 1885.

§§ 1835, 1836, 3246.

Costs against executor.— When recoverable upon reference of claim against a decedent.—Right to disbursements.— Construction of statute.

Where, upon a reference under 2 *R. S.* 88, § 86, of a claim against a decedent, the one making the claim succeeds, he cannot recover costs unless the payment of his claim has been unreasonably resisted;[1] a large reduction of the balance asserted in the claim to be due will justify a defense.[2] The justice of the cause of action of the plaintiff alone, unless the bill as presented gave a proper credit, would not make resistance to the payment of the balance demanded unreasonable.[3]

Where, in such a case, the executrix was the sister of the plaintiff, whose claim was for the board of the deceased and his wife (the executrix), and horse-keeping during seven years,—*Held*, that as the payment and allowance of such an account, involving, among other things, questions of value, by a sister in favor of a brother out of the residuary of an estate devised to strangers, was sure to be contested upon an accounting; it was not unreasonable that the executrix should, for her own protection, insist that the amount to be paid be fixed and established by a legal proceeding,[3] also *Held*, that it was not unreasonable for the residuary legatee, under the will of the deceased, to inquire strictly and sternly into the validity of such a claim concerning which it had no knowledge.[4]

The prevailing party in a reference under 2 *R. S.* 88, § 86, of a claim against a deceased person, is "entitled to recover the fees of referees and witnesses, and other necessary disbursements to be taxed according to law."[10]

That part of section 317 of the Code of Procedure which provides for the recovery of disbursements by the prevailing party in a reference under the revised statutes of a claim against a decedent, was not repealed either by Laws of 1877, chapter 318, by the Code of Civil

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Procedure,[6,9] or by chapter 245 of the Laws of 1880,[7,10] but is retained and preserved by section 3, subdivision 8 of the latter act, and is still in force.[7,10]

Sutton v. Newton (7 *N. Y. Civ. Pro.* 333); Hall v. Edmunds (67 *How. Pr.* 202), approved and followed;[5,6,7,9,10] Miller v. Miller (32 *Hun*, 481);[8] Dodd v. Dodd (*Unreported*),[12] questioned and not followed.

A decision of a general term should be followed by a judge at special term, unless it is clearly erroneous.[8] The Code of Civil Procedure, however, has been so often changed, and those changes are so often hidden in the maze of conflicting statutes, that hardly the same force can be attached to a decision as to its precise condition upon a single point, as there must be to one enunciating a legal principle; where the special term differs from that of the general term in the former case, and such difference amounts to a conviction, it may submit to the appellate tribunal the reasons of a dissent, to the end that the question in dispute may be thoroughly discussed and more deliberately considered.[8]

(*Decided August*, 1885.)

Motion by plaintiff in a reference under 2 *R. S.* 88, § 36, of a claim against the estate of the defendant's decedent for costs and disbursements.

The opinion states the facts.

A. F. B. Chace, for plaintiff and motion.

R. E. Andrews, for defendant and opposed.

WESTBROOK, J.—The plaintiff, who has obtained the report of a referee in his favor for the sum of $4,468.62, moves for the confirmation of the report, and for costs.

To the former, as there has been no case with exceptions presented, nor any cause shown why the plaintiff should not have a confirmation of the report, he is entitled, but to the latter there are serious objections to be considered.

It was a reference under part two, chapter six, title 3, article 2 and section 36 of the Revised Stat-

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utes * (2 *Edmonds R. S.* 91). The claim as presented was for $9,013.08, upon which there was a credit given for $1,800, making the balance claimed by the bill as originally presented $7,213.08. Subsequently, however, an amended bill was presented, by which the balance claimed was $9,462.68.

The report of the referee found the indebtedness of the deceased to the plaintiff to be $7,829.99, and that of the plaintiff to the deceased $4,072.73, leaving due from the latter, at the time of death, to the former, $3,757.26. The referee allowed interest on the balance found due to the plaintiff from the day of the commencement of this proceeding (May 3, 1882), which was $711.36, making the total sum found due at the date of the report (June 26, 1885), $4,468.62.

['] It was conceded upon the argument, and so the law is, that to justify the recovery of costs as in an action in which costs are given, the claim of the plaintiff must have been unreasonably resisted. Whether or not the plaintiff is entitled to referee's fees and disbursements will be hereinafter considered, but the question first to be discussed is, was the payment of the claim of the plaintiff unreasonably resisted or neglected?

The reduction of such claim from $7,213.08, as originally presented, to $4,468.62, and the establishment of a set-off of $4,072.73 instead of $1,800.00, as allowed upon the bill as presented, are facts which conclusively demonstrate that the resistance to the demand of the plaintiff was not only not unreasonable, but on the contrary reasonable and necessary.

It was strenuously, however, urged by the counsel of the plaintiff that as he had proved his claim by the defendant, she had full knowledge of its justice, and therefore it should have been paid without a refer-

* 2 *R. S.* 88, § 36.

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ence. To this argument there are two answers:
[*] 1st. The justice of the cause of action of the plaintiff alone, unless the bill as presented gave a proper credit, would not make resistance to the payment of the balance demanded unreasonable. The defendant may have proven the integrity and propriety of the plaintiff's charges, but either her evidence or some other testimony submitted to the referee satisfied him that the credits or set-off upon or to the bill as presented were over two thousand dollars greater than the plaintiff's affidavit attached thereto admitted. The resistance was to the payment of the balance demanded, and its large reduction is the justification of the defense made. 2nd. The defendant (the executrix) is the sister of the plaintiff. The claim of the plaintiff was for board of the deceased
[*] and his wife (the defendant), and horse keeping during a period of six years (from February 2, 1875, to February 2, 1881); and as the payment and allowance of such an account, involving, among other things, questions of value, by a sister in favor of a brother, out of the residuary of an estate devised to strangers, was sure to be contested upon an accounting, it was not unreasonable that the defendant should for her own protection insist that the amount to be allowed and paid should be fixed and established by a legal proceeding. Neither was it unreasonable for the residuary legatee under the will of the de-
[*] ceased, "The Children's Aid Society of the City of New York," to inquire strictly and sternly into the validity of a claim of the character of that presented by the plaintiff, concerning which it had no knowledge. It was hardly reasonable to suppose that board, lodging, and horse keeping would be furnished by a needy brother-in-law to a relative abundantly able to pay (the circumstances of the parties were conceded upon the motion), for a period of six years,

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and an indebtedness allowed to accumulate of several thousand dollars. This was scarcely to be expected, and the residuary legatee, itself a trustee charged with a sacred trust in behalf of helpless ones, only did its duty, reasonably, in making the defense.

For the reasons which have just been given, the motion, so far as it asks for costs generally and for an allowance, must be denied, and with the enunciation of this conclusion we are brought to the second question: Is the plaintiff entitled to referee's fees, witnesses' fees and disbursements?

It will be conceded that by section 317 of "The Code of Procedure" such fees and disbursements were given. That section provided that when a claim against a deceased person's estate was referred under the Revised Statutes, as this one was, that "the prevailing party shall be entitled to recover the fees of referees and witnesses and other necessary disbursements to be taxed according to law." It will be further conceded that if this provision is unrepealed, or if it has since been re-enacted, that the plaintiff is by this motion entitled to their allowance. In Sutton *v.* Newton (7 *N. Y. Civ. Pro.* 333), the judge writing this opinion, after a careful examination of the question, came to the conclusion that the provision quoted was still in force. That conclusion, in the light of Miller *v.* Miller (32 *Hun*, 481) and of an unreported case (Dodd *v.* Dodd), to which allusion will be presently made, he is asked to reconsider. The request will be cheerfully complied with, and such reconsideration will not be conducted with a view to sustain a previous conclusion, but to reach the exact right of the proposition to be considered.

Section 317 of the old code, "The Code of Procedure," regulated the recovery of costs in an action by or against an executor or administrator, trustee of an express trust or a person expressly authorized by

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statute to sue. The same section further declared (a quotation already in part given is repeated to show its connection): "But this section shall not be construed to allow costs against executors or administrators, where they are now exempted therefrom, by section 41 of title 3, chapter 6, of the second part of the Revised Statutes; and whenever any claim against a deceased person shall be referred pursuant to the provisions of the Revised Statutes, the prevailing party shall be entitled to recover the fees of referees and witnesses and other necessary disbursements to be taxed according to law."

The first thirteen chapters of our present code, "The Code of Civil Procedure," took effect (chapter 318, Laws of 1877) September 1, 1877. That act (chapter 318, Laws of 1877) was passed May 22, 1877, and it suspended the operation of the present code—known when first enacted as "The Code of Remedial Justice"—from May 1, 1877, the date when it originally took effect, to September 1, 1877, as just stated. The general repealing act of "The Code of Procedure" was passed June 5, 1877, and it declared among other things: "Section 1. The following acts and parts of acts, heretofore passed by the legislature of the State, are hereby repealed, to wit: . . 4. All the Code of Procedure; except the following sections and parts of sections thereof, to wit: . . Sections three hundred and eleven to three hundred and twenty-two, both inclusive."

[*] As, then, section 317 of the old code was expressly retained by the repealing act of 1877, it is clear that, after the first thirteen chapters of our present code took effect, and until at least the subsequent nine chapters of the present code, known as "Part Two of The Code of Civil Procedure," took effect (September 1, 1880), "the prevailing party," in a *reference* of the character of the present, recovered

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"the fees of referees and witnesses and other necessary disbursements to be taxed according to law." In an *action*, however, against executors or administrators, even though a recovery was had, no costs were taxable, unless the court so ordered upon the ground, either that the defendant had refused to refer the claim, or that he had unreasonably neglected or resisted payment (2 *Edmonds R. S.* 92, § 41).* By sections 1835, 1836 and 3246 of such "Part Two of the Code of Civil Procedure" the rule for the recovery of costs "*in an action*," prescribed by section 317 of the old code, was preserved. The present code, however, neither in the section referred to, nor in any other part, expressly states whether or not the remaining provision of section 317 of the old code, which provided that in references of the character of the present, the prevailing party should "recover the fees of referees and witnesses and other necessary disbursements to be taxed according to law," is still in
[*] force. It is true that section 3246 of the present code is a substantial re-enactment of section 317 of its predecessor, with the clause of that section providing for disbursements in references of the character of this omitted; but as such omission merely, without a declaration that the new section is a substitute for or a repeal of the old, does not make any inconsistency between the two, it follows that the new section is no repeal by implication of any part of the old. The present section (3246), and those to which it refers (1835, 1836), only give the rule in regard to costs "in an *action*," and as the proceeding had in this case is not "an *action*," but is one upon a (to use the exact language of § 317 aforesaid) "claim against a deceased person . . referred pursuant to the provisions of the Revised Statutes," the two are not in the least in-

2 *R. S.* 90, § 41.

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consistent. The correct view, therefore, is that, the adoption of part two of the present code did not repeal the provision referred to in section 317 of the old (*Potter's Dwarris on Statutes*, 156, 157; Wallace *v.* Bassett, 41 *Barb.* 92, 95, 96, and cases there cited; Estate of Curser, 2 *N. Y. Civ. Pro.* 411).

Part two of the present code passed the legislature May 6, 1880. Four days afterwards (May 10, 1880) chapter 245 of the Laws of 1880 was passed. By its first section, subdivision 4 (page 369), the old code was repealed. If that act had contained nothing more, very clearly the whole of the old section 317 would have been swept away. It did not, however, stop with a simple repeal, but it further provided (pages 374, 375): "§ 3. The repeal effected by the first [1] section of this act is subject to the following qualifications: . . . 8. It does not affect the right of a prevailing party to recover the fees of referees and witnesses and his other necessary disbursements upon the reference of a claim against a decedent, as provided in those portions of the Revised Statutes left unrepealed after this act takes effect."

The point now distinctly presented is, do the words—"as provided in those portions of the Revised Statutes left unrepealed after this act takes effect"—refer to "the fees of referees and witnesses and his other necessary disbursements," or do they refer to "the reference," of which the reservation also speaks? In other words, was it the intention of the clause to retain the provision in old section 317 giving referees fees and other disbursements in a reference, which had taken place according to and under the provisions of the Revised Statutes; or did it intend to give or retain referee's fees only in those cases in which the Revised Statutes gave them? Miller *v.* Miller (32 *Hun*, 481) and Daggett *v.* Mead (11 *Abb. N. C.* 116) hold to the latter view. Sutton *v.* Newton (7 *N. Y. Civ. Pro.*

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333) and Hall *v.* Edmunds (67 *How. Pro.* 202) to the former. Which of these two views is correct?

[*] Certainly, as Miller *v.* Miller is a decision of the general term of this department, it should be followed unless it is clearly erroneous. The code, however, has been so often changed, and those changes are so often hidden in the maze of conflicting statutes, that hardly the same force can be attached to a decision as to its precise condition upon a single point, as there must be to one enunciating a legal principle. Where the special term differs in the former case, and such difference amounts to a conviction, it cannot be disrespectful to submit to the appellate tribunal the reasons of a dissent, to the end that the questions in dispute may be thoroughly discussed and more deliberately considered. When the case of Sutton *v.* Newton was decided, the attention of the judge writing this opinion was directed by eminent counsel, not interested in that case and occupying a judicial position, to Hall against Edmunds and the various statutes therein referred to as being a better exposition of those statutes than Miller against Miller. A careful examination of the question then made induced the decision in Sutton *v.* Newton, with the conviction that the view expressed in the opinion was so clear that the question should be again presented to the appellate tribunal. The disbursements, which that opinion holds the prevailing party in that case was entitled to as matter of right, were also properly allowable with the costs generally upon the ground that the claim had been unreasonably resisted, and therefore no possible injustice could be done by giving the writer's views upon the question now under consideration. The point now, however, is presented somewhat differently. The conclusion has been reached in this case that the claim of the plaintiff was not unreasonably resisted, and therefore the propriety of

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following Miller against Miller is more forcibly presented than it was in Sutton against Newton. A careful study, however, has so thoroughly convinced the judge, to whom the present case has been submitted, that the decision referred to cannot be upheld, that he has been constrained to follow his own convictions, giving his reasons therefor, thus submitting the problem to the appellate tribunal, whether or not Miller against Miller shall be adhered to. The question is certainly approached with feelings of the highest respect for the members of the general term, and with the conviction that they, in common with the writer, have no other desire than the attainment of right.

Prior to an analysis of the saving clause in the repealing act of 1880, which will be presently attempted, it is well to bear in mind what has been established in the preceding part of this opinion, to wit: 1st—By the old code (§ 317) in references of the character of the present, "the prevailing party" was "entitled to recover the fees of referees and witnesses and other necessary disbursements to be taxed according to law." 2d—When the first thirteen chapters of our present code took effect, by the repealing act of 1877 (ch. 417, Laws of 1877), section 317 was continued in force. 3d—When the law was passed (May 6, 1880) adopting the remaining nine chapters of the present code, said section 317 was still in force. It also remained in force after their adoption, because the re-adoption and the re-enactment of old statutes do not, in the absence of a clause repealing the old, or of an express declaration that the new is a substitute for the old, abrogate them, for there is no inconsistency; and the omission to re-enact a part has only the effect to allow such omitted part to stand upon its original enactment. This consequence, and this only, followed from the adoption of part two of the present code.

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Sections 1835, 1836, and 3246, were simply re-
[*] declarations that all the provisions of said section 317, except the clause providing for the recovery of the disbursements aforesaid, should be in force, but the silence of our law-makers in the chapters referred to did not repeal a clear and positive provision in the old statute upon a subject which the new legislation did not profess to touch. In other words, part two of the code provided for the recovery of costs "in an *action*" against an administrator or executor, but it said nothing about the old section 317, nor about "the fees of referees and witnesses and other necessary disbursements" which such section gave as matter of "right" to "the prevailing party," when "any claim against a deceased person" had been "*referred* pursuant to the provisions of the revised statutes." Unless there was an intention to repeal, there was no occasion to speak—silence was the continuation of the old law (*Potter's Dwarris on Statutes*, 156, 157; Wallace *v.* Bassett, 41 *Barb.* 92, 95, 96, and cases there cited; Estate of Curser, 2 *N. Y. Civ. Pro.* 411).

We now understand the situation of the question under discussion, when four days after the adoption by the legislature, of part two of the present code, that body passed the repealing act of 1880. The effect produced by the adoption of the nine concluding chapters of the present code was the preservation of the old rule in regard to costs "in an *action*" against an administrator or executor. For the purpose of maintaining such old rule the existence of the old section 317 was no longer necessary—sections 1835, 1836 and 3246 were full and ample to effect that object. The old section was therefore repealed, but when that was done it became necessary, unless its total repeal was intended, to declare the fate of the remaining portion of such section, in regard to which absolute silence had up to that time been maintained. It

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[10] was therefore expressly further said that such repeal did "not affect the *right* of a prevailing party to recover the fees of referees and witnesses and his other necessary disbursements upon the *reference* of a claim against a decedent, *as provided* in those portions of the revised statutes left unrepealed after this act takes effect." Can anything be plainer? It was not the *power* to award "*costs*" in certain cases upon the establishment of sundry other facts, which was to remain unaffected, but the "RIGHT" (*i. e.*, the award thereof as a consequence of the recovery), to "the fees of referees and witnesses and his other necessary disbursements" by the prevailing party.

The exact similarity of the language of the saving clause of the repealing act just quoted with that of section 317 aforesaid proves that the framer of such saving clause penned it with his eye upon the provision of the section we are discussing. The identity of the language used by both can be accounted for upon no other hypothesis. When, therefore, in order to specify in what cases the "right" to such disbursements was given, there were added to those giving them, these further and additional words, to wit, "upon the reference of a claim against a decedent, as provided in those parts of the revised statutes left unrepealed after this act takes effect," the meaning was unmistakable. It was not the right to sundry disbursements given by the revised statutes which was preserved, but the "right of a prevailing party .... upon the reference of a claim against a decedent as provided in those portions of the revised statutes left unrepealed" to the particular disbursements specified in the repealing act was retained. If there was nothing to guide us but the words and structure of the sentence the meaning would be unmistakable. When, however, we add to the language used, the further arguments that the revised statutes never, on such a reference, gave either

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costs or disbursements to the prevailing party as a "*right*," but only empowered the court in its discretion, upon certain facts being proved, to give "*costs*" generally; and that the section of the revised statutes (2 *Edmonds R. S.* 91, § 37)* which gave to courts in references of this character the "power to adjudge costs, as in actions against executors" was, with the entire section which contained it, expressly retained and preserved by the same repealing act (ch. 245, Laws of 1880, subdivision 3 of section 1, page 368), the meaning becomes too clear for discussion.

Under such circumstances to say, as was hastily said in Miller *v.* Miller (32 *Hun*, 481), that the sentence in the repealing act "has reference *simply* to provisions of the revised statutes," is to declare that such sentence has no meaning whatever. An exception is only necessary when without it, the thing excepted would be affected. If any part of the revised statutes, left unrepealed by the repealing act, gave the disbursements saved by such acts, it was unnecessary to declare that such part of the revised statutes was unaffected by the repeal. To make that declaration is equivalent to an announcement that what in fact is unrepealed is unrepealed. Neither could the clause have been intended to preserve the "right" to disbursements given by the revised statutes, because such statutes, neither then or at any time, gave them; nor could its intent have been to preserve the power in the court to award such disbursements as a part of the costs, in those cases in which, if it had been an action, they could have awarded them, because the power "to adjudge costs, as in *actions* against executors," was expressly retained by the same act; and as the right to the disbursements specified in the saving clause of the repealing act, together with others, fol-

*2 *R. S.* 88, § 37.

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lowed the right to costs in an action, of which they form a part (*Code*, § 3256), it was unnecessary to say a word further upon that subject.

Unless, therefore, the court is prepared to say that the clause is wholly useless, it must be held, as its plain language clearly requires, that the referee's fees, the witnesses' fees and disbursements are still recoverable by the prevailing party in a reference of this character, as they have been for many years. The equity of protecting a successful party against his necessary disbursements in the establishment of his claim, which are oftener greater than the recovery, was as great when the act of 1880 was passed as it had ever been. No complaint had ever been made against its wisdom; and when the right to recover sundry disbursements is plainly and unmistakably retained or given, it is not a wise exercise of judicial power to render inoperative clear words, even though in the attempted preservation or gift a reference was made to a wrong statute, as the one previously conferring the same right (People *v.* Lucas, 25 *Hun*, 610, see 611). No one can doubt that the intention was to preserve "the *right* of a prevailing party to recover the fees of referees and witnesses and his other necessary disbursements upon the reference of a claim against a decedent," for the act so declares, and the exact words have just been quoted.

If the grammatical construction of the sentence giving them is, as the general term assumed in Miller *v.* Miller, that the framer of the clause supposed they were given by the revised statutes, and therefore made the section to read as if the revised statutes gave them, that mistake could not nullify their effect. The "right" to such disbursements, as one flowing from the recovery, as distinguished from the power to award them, is preserved, and courts should so hold without attempting to nullify them by a strained con-

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struction, which makes the sentence meaningless. But there was no such mistake. The revised statutes, it is true, gave the court power to award "*costs*," and that was preserved, as is elsewhere shown, in the same act, but they never gave "the *right*" to such "*costs*" upon a recovery, and there never was any pretense of the *power* to award any disbursements without awarding costs generally in a proceeding of this character, until section 317 of the old code gave such disbursements as a "*right*" to "the prevailing party." In construing a statute it is to be assumed that the legislature knew the exact status of the statutes, and therefore, when they gave or retained the "right" of "the prevailing party" to them, and used the exact words of the statute which originally gave them, they meant to preserve them as there given; and the reference to the revised statutes is to them as giving the *mode of procedure*—the reference—and not the disbursements, which are retained. The excepting and saving clause of the repealing act is too clear for doubt. Its author evidently wrote it, as before stated, with an open eye resting upon section 317 of the old code. This the identity of the language proves, and that both give the same disbursements is, as it seems to me, too clear for discussion and debate.

The opinion would close at this point, if the counsel of the defendant had not, as he properly did, called
[11] the attention of the court to the opinion of Judge Bockes in the unreported case of Dodd *v.* Dodd, decided by the general term of this department, in which the writer of this opinion as a member of such court concurred. The fact, however, that the judge to whom this case has been submitted has once given an opinion to the contrary of that herein expressed, is no answer to the arguments now presented. Nay, duty requires him to correct and point out his own error with the same freedom and candor that he would

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exercise were he dealing with the supposed error of another.

The explanation is simple. Dodd *v.* Dodd was not a case argued orally. It was submitted to the court upon the printed case and points. Mr. D. S. Potter was counsel for the plaintiff, and Mr. P. C. Ford for the defendant. The special term (Judge J. POTTER presiding) had allowed the plaintiff full costs upon the ground that the claim had been unreasonably resisted. In his points (and they are now before the writer) the counsel for the plaintiff nowhere discusses the question of his right to disbursements under section 317 of the old code, nor is any reference made to the repealing act of 1877, nor to that of 1880. The aim of the points is to show that "costs are in the discretion of the court;" and that they were in the discretion of the court because the Revised Statutes gave the court the power to "adjudge costs as in actions against executors," and also because the reference was a "special proceeding," and not "an action." He further claimed that "section 3240 of the code provides expressly that costs in a special proceeding, not specially regulated by the code itself, may be awarded to any party, *in the discretion of the court.* Costs being in the discretion of the court to give or withhold, the appellate court will not reconsider the question." The points then proceed to argue that the discretion of the special term was wisely exercised.

The counsel for the defendant argues in his points (they are also before the writer) that costs should not have been allowed because, among other reasons stated, the claim was not unreasonably resisted. There is no allusion to the right to disbursements except this: "Under the old code, the prevailing party in such proceedings was entitled to recover his disbursements, even though he might not be entitled to costs;

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but this provision has been omitted in the new code, so that disbursements must now follow costs."

The case was assigned to Brother BOCKES to examine. The plaintiff, as has been said, did not claim disbursements apart from costs, and made no allusion to the condition of the law upon the subject. The defendant, also, did not refer to the statutes at all, and only insisted that no disbursements separate from costs could be recovered because the provision in the old code giving them had "been omitted in the new code." The learned and careful judge, to whom the case was committed for examination, was thus easily led into error. Through several pages in an exhaustive opinion he demonstrates that the plaintiff should not recover costs. When he reaches the question of disbursements, having been thrown off his guard by the want of presentation of that question by the plaintiff's counsel, he simply adopts the erroneous view of defendant's counsel, saying: "Under the former code (§ 317) the plaintiff would have been entitled to recover 'the fees of the referee and witnesses and other necessary disbursements to be taxed according to law,' although not entitled to full costs, as in an action (Penkernelli *v.* Bischoff, 2 *Abb. N. C.* 107; Pursell *v.* Fry, 19 *Hun*, 595). Such allowance would seem unjust in a case like the present, when the entire contest was over an item found to be fictitious. But the clause of section 317 of the former code above cited is omitted from section 1836 of the Code of Civil Procedure, which latter section superseded the former and controls the case now before us (See also § 3246)." This is all the opinion says upon the question.

The conclusion stated by the judge—that the omission from the new code was a repeal of the clause giving disbursements in a reference of this character as a matter of "right"—was erroneous, as has been shown. It looked plausible, and it was in the points submitted

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an uncontroverted proposition. Errors of judges, into which they are sometimes led by the oversight of counsel, are pardonable. A judge is a man, liable to err, and when so learned and accurate a jurist as Judge BOCKES fell into this error, it was but reasonable to suppose that another judge, who had the same reasons to err, and to those in addition, the opinion of a learned judicial brother sustaining the same error, would concur.

Under the circumstances narrated, the concurrence of the writer in Dodd *v.* Dodd was given. None of the questions which have been considered were discussed. Nay, the counsel for the plaintiff, by his silence, and by his line of argument, conceded that the disbursements apart from the costs were not recoverable; and a brother judge, who had examined the question, fell into an error. The opinion of Judge BOCKES was carefully read upon the main question discussed, but that in regard to disbursements—*substantially conceded in the points*—was not considered as it should have been. The case had been entirely forgotten when the opinion in Sutton *v.* Newton was written. Had it been remembered, it would not have changed the result, but would only have induced the fuller, and it is hoped more satisfactory, discussion of the question, which has now been attempted.

The motion for costs generally and for an extra allowance must be denied, but the order should provide that the plaintiff shall recover the fees of the referee and witnesses, and his other necessary disbursements, to be taxed according to law.

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In re RAMON CAAMANO, AN IMRISONED DEBTOR.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY; SPECIAL TERM, JUNE, 1885.

§§ 2188 *et seq.*, 2191, 2194.

Discharge of insolvent debtor from imprisonment—When appropriating property of creditor to his own use will not prevent—Burden of proof.*

An insolvent debtor imprisoned in a civil action to recover from him moneys belonging to the plaintiff converted by the debtor to his own use, upon complying with sections 2188 *et seq.* of the Code of Civil Procedure is entitled to be discharged from imprisonment;[1] the money appropriated by him was not his own but that of the plaintiff, notwithstanding a part of it was wrongfully obtained by mortgaging the plaintiff's real property under a power of attorney held by him, and his use of the money for his own purposes was not a disposition of his property with intent to defraud his creditors.[1,2,3]

Suydam *v.* Belknap (20 *Hun*, 87), followed.[3] *In re* Brady (60 *N. Y.* 215), distinguished.[3,5]

In such a case, *it seems* that if the debtor disposed of the plaintiff's property or a portion of it for the future benefit of himself or family he cannot be discharged.[6] The burden of proving such a disposition of the property would be on the creditor.[6]

(*Decided June*, 1885.)

Application by an insolvent debtor imprisoned under an order of arrest granted in a civil action, for his discharge from imprisonment and exemption from arrest.

The opinion states sufficient facts.

* See *In re* Lowell, *ante*, p. 5.

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ANDREWS, J.—After a careful examination of this case, I have reluctantly come to the conclusion that the application for the discharge of the petitioner must be granted. There is no dispute about the facts upon which the order of arrest was obtained. Caamano, having in his possession, a large sum of money belonging to Mrs. Roderiguez, who resided in Spain, used the same for his own purposes, and then, under a power of attorney which he held, raised $40,000 more by mortgaging Mrs. Roderiguez's real estate, which was situated in New York, and used this sum in the same manner. The latter transaction was so deliberately planned, and so carefully and coolly carried out, as to leave no possible doubt that he is a man who hesitates at nothing to accomplish his purposes. He has no possible claim upon the sympathy or tender consideration of the court, and, did the law permit, it would be but justice that he should be imprisoned for a long term of years. He must, however, be
[1] accorded the rights secured to him by the laws of this State, and I am of the opinion that upon complying with the provisions of the code, he must be discharged.

In Suydam *v.* Belknap (20 *Hun*, 87), which was an application like this, the petitioner was arrested
[2] for converting to his own use moneys and securities belonging to the plaintiff, while acting in a fiduciary capacity, and was imprisoned in default of $35,000 bail. He applied for a discharge, and his examination showed that in violation of his trust he had used the money and property for his own benefit. It was nevertheless held by Mr. Justice WESTBROOK that he was entitled to his discharge, because it did not appear that he had disposed or made over any part of his own property, with a view to the future benefit of himself or his family, or with intent to injure or defraud any of his creditors. On appeal the order for

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the discharge was affirmed. The court at general term said: "This case is distinguishable from that *In re* Brady (69 *N. Y.* 215), because the charge is that the defendant received money in a fiduciary capacity for which he has not accounted. The defendant, Brady, was charged with a disposition of his property with the intention of defrauding his creditors, and for that reason it was held that his proceedings were not just and fair. This case does not show any appropriation of this kind, and therefore that he has property attainable by recourse to his grantee or otherwise. The money received was disposed of by him, and though improperly used does not subject him to the rule established by the case referred to. We cannot say under the circumstances that his proceedings have not been just and fair."

[*] It seems to me that this case is decisive of the present application. With regard to the first money appropriated by Caamano the cases are identical. With regard to the $40,000, the learned counsel for the plaintiff claims that the decision in Suydam *v.* Belknap is not applicable, because the money was obtained through a mortgage, and when it came into Caamano's possession was to be regarded as his money, and that he has therefore disposed of his own money with intent to defraud his creditors, or for the future benefit of himself or members of his family.

[*] I am not able to concur in this view. From a moral standpoint Caamano's conduct in raising money by mortgaging his principal's property, and then appropriating it to his own use, was, if possible, more infamous than in so appropriating moneys which had lawfully come into his possession, for, in the former case, he committed a double crime. This, however, does not change the legal aspect of the matter. The $40,000 was not, in the eye of the law, his money, but that of Mrs. Roderiguez, and when he appropriated

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it he was disposing of her money and not his own. So far as this application is concerned, the $40,000 must be regarded as money which, though obtained by a previous fraud, was held by Caamano in a fiduciary character, and upon a trust, which the law would imply to pay it over to Mrs. Rodericguez, whose property had been incumbered to raise it. Viewed in this light, the decision in Suydam *v.* Belknap is just as applicable to the $40,000 as to the moneys previously appropriated, and I am constrained by it to hold that Caamano is entitled to his discharge.

The distinction between cases like the present [*] one and that presented in the matter of Brady (69 *N. Y.* 215) is pointed out in the opinion of the general term. In the latter case, the petitioner had disposed of his own property with intent to defraud the creditors who opposed his discharge, and the affidavit required by the statute that he had not done so was therefore untrue, and his proceedings were held not to be just and fair. It may well be, as was held in In the matter of Roberts (59 *How.* 136), that it is worse for the debtor to dispose of the creditor's property than for him to dispose of his own, and that the former act as well as the latter ought to prevent his discharge. It is not, however, so provided in the statute, and the views of the learned judge who decided the Roberts case were expressly disapproved by the general term of the court of common pleas (*In re* Fowler, 8 *Daly*, 548).

Counsel for the plaintiff also calls attention to the fact that portions of the fund with which the $40,000 was mingled were given by Caamano to his wife, his brother and brother-in-law, and claims that his conduct "does not make it a violent supposition that he purposely turned over a large part of Mrs. Roderiguez's property for the future benefit of himself and various members of his family."

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Of course, if he had disposed of Mrs. Rode-
[*] riguez's property in this manner, he could not be discharged. The burden of proof, however, to show such disposition of her property is on the plaintiff (In the matter of Benson, 10 *Daly*, 166). Not only is such disposition not shown by the plaintiff, but the examination of the debtor, which stands uncontradicted, establishes the contrary. The testimony is that the real estate conveyed to his wife was inherited by her from her mother, and a satisfactory explanation is given why the title was taken in Caamano's name and of the subsequent conveyance. The testimony is also to the effect that the payments to his relatives were for full consideration out of moneys that belonged to them. There is no evidence that Caamano disposed of his own property or that of Mrs. Roderiguez for the future benefit of himself or members of his family, or with intent to defraud his creditors, and an order must be granted directing him to execute an assignment to a trustee, and that he be discharged upon complying with the provisions of the Code relating to the assignment and delivery of his property.

BOWE, RESPONDENT, *v.* THE UNITED STATES REFLECTOR COMPANY.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, JUNE, 1885.

§ 709.

Sheriff's fees on attachment.—When sheriff has not lien therefor on attached property.—Unconstitutionality of section 709 of the Code of Civil Procedure.

The sheriff has not a lien for his fees and expenses upon property levied upon under an attachment, after the attachment is vacated

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or abandoned, and cannot hold it until his costs and expenses have been paid or sell it for their payment.[9]

The provision in section 709 of the Code of Civil Procedure requiring the "payment of all costs, charges, and expenses legally chargeable by the sheriff" before the sheriff is required to deliver to the defendant in an attachment, property seized under a warrant of attachment in a case where, on the application of the defendant, it has been vacated or annulled or the attachment discharged, is unconstitutional and void;[4,5] it, in effect, allows the property of one person to be taken for the debt of another.[1,2,3,4]

Woodruff v. Imperial Fire Ins. Co. (90 *N. Y.* 521); [6] Hall v. U. S. Reflector Co. (4 *N. Y. Civ. Pro.* 148); [7] Hopfensach v. Hopfensach (61 *How. Pr.* 498), [8] distinguished.

Where the plaintiff and defendant in an attachment entered into a stipulation that the sheriff should pay the rent of the premises in which the attached property was, which was then owing, and would thereafter until the final disposition of the property fall due, and that the rent should be treated and regarded as a part of the sheriff's expenses under the process, upon the understanding that the sheriff could hold the property for his fees and expenses under the attachment,— *Held*, that the sheriff had a lien for the rent paid by him under such stipulation, and after the attachment was vacated could maintain an action against the defendant in the attachment to procure a sale of the property to satisfy the same.[10]

(*Decided, June* 17, 1885.)

Appeal by defendant from interlocutory judgment overruling his demurrer to the complaint.

The facts are stated in the opinion.

Edward P. Wilder, for defendant-appellant.

Malcolm Graham, for plaintiff-respondent.

DANIELS, J.—The object of this action is to obtain a judgment declaring the plaintiff, as late sheriff, to have a lien upon certain personal property for his fees, disbursements and expenses, and for the sale of the property to satisfy the same. The property consists of a stock of manufactured articles and other things seized by the sheriff under an attachment issued in

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favor of Bolton Hall and others against the United States Reflector Co.

After the seizure of the property it remained in the possession of the sheriff until on or about the 5th of May, 1883, when it was ordered in the action, that the warrant of attachment be vacated, annulled and set aside, unless the plaintiffs should increase the security given by them upon the attachment. They failed to do that, and "on the 5th of June, 1883, it was ordered that said attachment be vacated, annulled and set aside." A copy of this order was served upon the plaintiffs, with notice of its entry, it has remained in force in the action ever since that time. The fees, expenses and disbursements of the sheriff under the attachment were adjusted, and upon the sum allowed the plaintiffs paid the sheriff $3,740, leaving a balance still unpaid to the sheriff of $5,429.78. The attached property has remained in the possession of the plaintiff, notwithstanding a demand made for its delivery on behalf of the defendants in the action, and it is for the collection and satisfaction of this balance that the plaintiff is now proceeding by this action to enforce it as a lien in his favor against the attached property, and for which it is claimed that the sale of the property shall be made.

This right on the part of the sheriff is asserted to have been created by section 709 of the Code of Civil Procedure, and it has been directed by it that, where a warrant of attachment is vacated or annulled, or an attachment discharged upon the application of the defendant, the sheriff must, except in a case where it is otherwise specially prescribed by law, deliver over to the defendant or to the person entitled thereto, upon reasonable demand and upon payment of all costs, charges and expenses legally chargeable by the sheriff, all the attached personal property remaining in his hands, or that portion thereof as to

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which the attachment is discharged, or the proceeds thereof if it has been sold by him. The right of the sheriff to hold the property after the discharge of the attachment has been denied by the defendants, who claim that the legislature had no authority to subject it to the obligation of paying the sheriff's costs, charges and expenses after the attachment had been discharged.

The attachment was not issued at the instance or under the authority of either of the defendants, but solely at the instance and upon the application of the plaintiffs in the action. It was, to the defendants, as an adverse proceeding, whose object was to seize the property of the party against whom the attachment was issued and hold it as a security for the plaintiff's demand in the action. By such a proceeding the owner of the attached property entered into no obligation or duty to pay its costs, charges or expenses. But so far as a liability for their payment would arise out of the facts, it must be exclusively that of the persons in whose favor and at whose instance the attachment was issued and the property was seized. Its seizure arose out of no fault of the defendant, as has been demonstrated by the fact that the attachment has been voluntarily abandoned, and also set aside by an order of the court. But without its consent its property was taken under it and placed in the possession of the sheriff, where, since its seizure, it has remained. To permit the sheriff to hold it now, after the attach-
[1] ment has been set aside, until his costs, charges and expenses have been paid, and sell it for their payment, would be to allow him to hold and dispose of the property of one party to pay the debt exclusively of another. For no further proceedings can be instituted or maintained in this action which will convert his demand into a legal liability of the defendant proceeded against. It must still remain and continue to

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be a demand owing by other parties, and the point, therefore, arises to be determined whether the legislature has the authority to provide that the property so seized after the discharge of the attachment can be applied or appropriated by the sheriff to the payment and satisfaction of such a demand. To apply and appropriate it in that manner is to take the property of one party against his or its consent and apply it to the payment or discharge of the obligations of another, and that has not been considered to be within the authority of the legislature.

Upon this subject care has been taken to preserve
[*] and protect the rights of the owners of property against interference of this description, even though that may have been provided for by an act of the legislature. To prevent such interference it has been declared that "no member of this State shall be disfranchised or deprived of any of the rights or privileges secured to the citizens thereof unless by the law of the land or the judgment of his peers . . . . nor be deprived of life, liberty or property without due process of law" (*Const.* article 1, §§ 1 and 6). And these provisions have been so construed as to maintain the
[*] rights of property against mere legislative interference, and as requiring a legal proceeding following other ordinary forms of law, and resulting in a judgment upon some obligation or contract or liability incurred by the party proceeded against before he can be divested of his property and it can be applied to the use of another party. They protect the owner against the taking of his property by color of legislative authority, to bestow it upon, or give, or devote it to the uses of another person. This was generally considered in N. Y. & Oswego R. R. Co. *v.* Van Horn (57 *N. Y.* 473). And it was held by the court that the legislature never can take the property of one individual without his consent and give it to another.

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And this salutary general principle has also been maintained in Embury *v.* Connor (3 *N. Y.* 511–515); Taylor *v.* Porter (4 *Hill*, 141); Wiesmer *v.* Village of Douglass (64 *N. Y.* 91, 105). That is precisely—where an attachment has been set aside, vacated or annulled, either by the abandonment of the party in whose favor it is issued or by an order of the court—what this section of the Code has provided may be done with the property of the defendant when it has been seized under an attachment. This direction in its practical effect is to take the property of the defendant after the lien of the attachment has in this manner been removed and apply it to the payment of the debt created by issuing and serving it, and afterwards detaining the defendant's property under its authority; and no more flagrant violation of the rights of an owner of property can well be imagined. If it should be sustained, there will be nothing to prevent a repetition of what seems to have taken place in this instance—that the defendant's stock in trade shall be taken into the possession of the sheriff, his business interrupted and for the time destroyed, and when the attachment can be no longer maintained, to leave him, as the only alternative for resuming the possession of his property, the payment of the costs, fees and expenses of the proceedings by which he may have been despoiled. And it was in part to protect parties against disasters of this description that those constitutional provisions were adopted, and to prevent them from being produced by the mere fiat of a legislative direction.

[*]

It will be no answer to the protection which these provisions of the constitution were designed to afford that the person whose property may be taken from him and held by the sheriff until he shall pay his costs, charges and expenses, may reimburse himself for the amounts paid by a suit upon the undertaking.

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For that will ordinarily afford him no equivalent for the loss and destruction of his business after it has been brought about in this manner.

A suit upon an undertaking where the defendant's stock in trade may have been taken from his possession, and his business interrupted and suspended, would afford him no redress for the most serious injury he will appear to have sustained. For the loss to which he would be subjected by the interruption of his business must usually be incapable of being proved in such a manner as to render it the subject of compensation in an action. But if that could be proven, the perplexity, delay and suspense to which the defendant would necessarily be subjected in the prosecution of an action would to a great extent deprive him of anything like adequate redress for the injury inflicted upon his affairs. Then, before an action even upon the undertaking could be maintained, the costs, charges and expenses of the sheriff would require to be paid, and it is not every person whose property may be seized and whose business may be thereby interrupted, who would have the ability to raise the money required to make such payments. That may very well be the position of the defendant against which the attachment issued in this case. For before possession of its property can be assumed, it has been required under the authority of this section of the Code to raise and pay to the sheriff this large sum of $5,429.78. An action, the right to maintain which can only be secured in this manner, must evidently fall far short of adequate means of redress to the party whose property may be seized and held in the manner in which this stock was taken and held by the sheriff. It would not justify legislation of the [*] description of that contained in this section of the Code. For it would permit the taking of the property of another and applying it to the discharge of the

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obligation of the party taking it, without affording any adequate means of redress for the wrong so committed.

The case of Woodruff *v.* Imperial Fire Ins. Co. (90 [*] *N. Y.* 521) in no manner tends to maintain the authority of this legislation; for there the defendant settled with the plaintiffs, paying the amount of his claim, and thereby conceded the regularity of the attachment, which might very well primarily subject him to the payment of the sheriff's costs, charges and expenses, while in this case there was no such concession in any form whatever; but the regularity of this seizure was practically superseded by the order made vacating the attachment. The case of Hall *v.* United States Reflector Co. (4 *N. Y. Civ. Pro.* 148) does not con- [*] sider the power of the legislature to devote the property of the defendant in an attachment, after it has been annulled or vacated, to the payment of the fees and expenses, not in any manner created or incurred by its owner, but it in effect declined to consider the rights of the sheriff, as it there appeared that they were being made the subject of determination in other legal proceedings, and no authority has been found lending its sanction to the theory that the legislature may subject the property of a defendant to the payment of the sheriff's fees and expenses, after his entire power over it has been ended by vacating or setting aside the attachment. The principle is entirely different from that which has been held to sustain the right of a receiver to compensation from the property itself or its owner after it has been remitted to the care and protection of such an officer in the course of legal proceedings.

That was the case of Hopfensach *v.* Hopfensach [*] (61 *How. Pr.* 498). There the property was held and preserved for the benefit of all the parties to the controversy, and for that reason it was properly decided

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that the receiver could not be divested of his possession without the payment of his fees, while here the property was not taken or held in any sense for the benefit of the defendant in the attachment, but that was exclusively for the advantage and benefit of the plaintiff So far, therefore, as the claim of the [*] sheriff against the property consisted of costs, fees and expenses, unauthorized or sanctioned by the defendant in the attachment, he had no lien upon or right of possession to the property which had been taken under attachment. And to that extent no legal authority exists in support of his action brought to sell the property for the satisfaction of his costs, charges and expenses.

At the time when the property was taken it was in the store known as number 4 Great Jones street, and both the plaintiff and the president of the defendant in the attachment entered into a stipulation by which they agreed that the sheriff should pay the rent then owing for the premises and such rents as should afterwards fall due until the property should be finally disposed of, and that the rent should be treated and regarded as expenses of the sheriff in this action under the process held by him. This stipulation, and another of the like effect afterwards made, seem to have been entered into upon the understanding that the sheriff could hold the property for his fees and expenses under the attachment, and to induce him to pay the rent and protect himself in this manner because of this understanding. He did pay for the rent of these premises after these stipulations were made, and before his right to do so under their authority was in any manner withdrawn or denied, the sum of $3,605. And for so much of that as was [**] not discharged by the payments which the plaintiff made to the sheriff on account of his fees and expenses, he had the right to hold this property.

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For it is fair to assume that he would not have paid this rent if these stipulations had not been entered into. He was induced by them to make the payments, and that was done by the concurrence and authority of the defendant in the attachment as well as that of plaintiff. And after having induced him to make such payments with the expectation and implied assurance that the amounts paid should be secured by the property attached, the defendants are not at liberty to deny the right of the sheriff to this remedy. So far as he holds the property for the rent paid, this action may well be maintained. To that extent the sheriff has a right of action for the sale of this property to reimburse him for the amount still owing to him, which was paid out upon the faith of these stipulations. But beyond that he has no right to proceed against this property for the satisfaction of his costs, charges and expenses. As, however, something still remains due to him on account of the rent paid, the action to that extent must be maintained, and that will require the judgment from which the appeal has been taken to be affirmed, but with liberty to the defendants to withdraw their demurrers and to answer on payment of costs.

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DAVIS, JUDGMENT DEBTOR, *v.* JONES, JUDGMENT CREDITOR.

SUPREME COURT, FOURTH DEPARTMENT ONONDAGA COUNTY SPECIAL TERM, JUNE, 1883.

§§ 416, 2441, 2458.

Appearance—Is predicated of plaintiff—Supplementary proceedings—When may be maintained.

Appearance is predicable of every party to an action, whether plaintiff or defendant, who submits himself to the jurisdiction of the court; [1] the appearance of the plaintiff is complete when a summons in proper form has been served upon the defendant. [2]

Proceedings supplementary to execution may be maintained upon a judgment against the plaintiff in an action, for costs. [3]

Where an order for the examination of one "H." in proceedings supplementary to execution was granted June 27, before the return of the execution, upon an affidavit that said "H." was indebted to the judgment debtor "in a sum exceeding ten dollars, for rent, to wit $100," and it appeared that such rent would not become due from "H." to the judgment debtor until July 1,—*Held*, that a man is indebted equally whether his debt is due or to become due, and therefore the indebtedness which must be shown to exist before the debtor of a judgment debtor can be examined, sufficiently appeared. [3]

(*Decided June* 30, 1883.)

Motion to vacate order for examination of person indebted to judgment debtor.

The opinion states the facts.

— *Richardson*, for motion.

— *Baker*, opposed.

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CHURCHILL, J.—February 5, 1883, the defendant, John E. Johnson, recovered judgment against the plaintiff for $127.47 costs.

Execution against the property of the plaintiff was issued June 6, 1883, which yet remains in the hands of the sheriff unsatisfied.

Upon an affidavit of the judgment creditor that one Joseph Hovert was indebted to the plaintiff "in a sum exceeding $10 for rent, to wit, in the sum of $100," the special county judge of Oneida County granted an order under section 2441 of the Code of Civil Procedure for the examination of Joseph Hovert.

The motion to vacate this order is made upon two grounds.

1st. That "appearance" is predicable only of a defendant, and that therefore, under section 2458 of the Code, proceedings supplementary to an execution cannot be taken upon a judgment for costs only rendered against the plaintiff.

2d. That the affidavit of the judgment creditor showed that nothing was actually due from Hovert to the plaintiff, but only that something would become due at a future day.

A. The first ground of the motion is untenable.

[1] Appearance is predicable of every party to an action who submits himself to the jurisdiction of the court, whether plaintiff or defendant.

The plaintiff does this by commencing his action; the defendant, by voluntarily submitting himself to the jurisdiction of the court after the action is commenced.

Formerly, such appearance, both of plaintiff and defendant was made in *propria persona*, afterwards by attorney (3 *Blackstone*, 25; Cooley *v.* Lawrence, 12 *How.* 176, 182).

Under the Code Civil Procedure, section 55, the plaintiff must appear in person, or by attorney, and if

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he appears by attorney he cannot afterwards appear to act in person. And his appearance in an action is [*] complete when a summons in proper form, signed by himself or his attorney, has been served upon the defendant, section 416.

B. I think the second ground is also untenable. The last part of the affidavit upon which the order was granted, stated positively, substantially in the words of the statute, that Hovert was indebted to the plaintiff in a sum exceeding $10, to wit $100. And that, in this department, has been held sufficient to give the officer jurisdiction to grant the order (First Nat. Bk. *v.* Wilson, 5 *N. Y. Week. Dig.* 565). But taken in connection with other parts of the affidavit I think it fairly appears that the only indebtedness of Hovert to the plaintiff was upon the lease of a farm in which the plaintiff had a life interest, and of which Hovert was tenant, upon which lease $100 would become due July 1, 1883.

As the affidavit and order were made June 27, 1883, nothing was due from Hovert to the plaintiff at that time, and so the point made by plaintiff's counsel fairly arises upon the papers.

But a man is indebted equally whether his debt [*] is due, or to become due, and the fact, therefore, the existence of which must be shown before the debtor of a judgment debtor can be examined, appears sufficiently from this affidavit.

The motion, therefore, is denied, with ten dollars costs.

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CLAFLIN ET AL. v. DAVIDSON, AS SHERIFF, &c.

N. Y. SUPERIOR COURT, SPECIAL TERM, AUGUST, 1885.

§§ 1726, 1727, 3228.

Costs—When taxable in actions for replevin.

Where the verdict awards to the plaintiff possession of a chattel which was replevied by him and retained, and no damages are awarded, and the verdict does not fix the value of the chattel, plaintiff is entitled to tax a full bill of costs, notwithstanding the provisions of subd. 2, section 3228, Code of Civil Procedure.

There is no provision in the Code of Civil Procedure requiring the verdict in an action for replevin to fix the value of the chattel where it awards possession of the chattel to the person to whom it has been delivered.

(*Decided August* 10, 1885.)

Motion by plaintiff to compel the clerk to tax his full bill of costs.

The action was for replevin. The goods were taken from the sheriff immediately after their seizure by him under attachment, by the writ of replevin issued herein, and remained in plaintiffs' possession till the verdict, which awarded them the permanent possession of the chattels, and neither awarded damages nor fixed the value of the goods.

Defendant claimed that as it was not shown by the verdict that the goods were worth $50, plaintiffs were not entitled to a full bill of costs, and that as no value was fixed, defendant was entitled to costs.

Arnoux, Ritch & Woodford, for plaintiffs.

W. Bourke Cockran, for defendant.

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INGRAHAM, J.—Sections 1726 and 1727 of the Code provide the cases in which the jury must fix the value of the chattels. By section 1726 it is provided that when a verdict, report, or decision awards to a plaintiff a chattel which has not been replevied, or where it awards to the prevailing party a chattel which has been replevied and afterwards delivered by the sheriff to the unsuccessful party to the action, it must also, except in the cases specified in the next section, fix the value of the chattel at the time of the trial.

In this case the verdict awarded to the plaintiff a chattel which had been replevied, and the case therefore is not within section 1726 of the Code. Section 1727 provides for the cases where the verdict or decision is in favor of the defendant.

There is no provision in the act that requires the verdict to fix the value of the chattel where it awards the possession of the chattel to a person to whom it had been delivered.

By section 3228 of the Code the plaintiff is entitled to costs upon the rendering of the final judgment in his favor, in either of the following cases: "2. An action to recover a chattel; but if the value of the chattel or of the chattels recovered by plaintiff as fixed, together with the damages, if any, awarded to him, be less than fifty dollars, the amount of his costs cannot exceed the amount of the value and the damages."

Reading this section with sections 1726 and 1727, I think it must have been the intention of the legislature to limit this provision to the case in which the jury or the court were authorized to fix the value of the chattel, and I think the true meaning of the section is that the plaintiff is entitled to costs in an action to recover the value of a chattel, except that in an action in which the jury are authorized to find the value of the chattel, if the value of the chattel and the

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damages do not exceed fifty dollars, the costs cannot exceed the amount of such value and the damages.

I am inclined to think, therefore, that the costs should have been taxed by the clerk. Motion should therefore be granted, and the clerk directed to tax the bill of costs presented by plaintiffs. No costs.

GRAY *v.* LIEBEN.

N. Y. COURT OF COMMON PLEAS. CHAMBERS, DECEMBER, 1884.

§§ 2433, 3017, 3022, 3043.

Execution in N. Y. county in justice's judgment of another county—How issued—Order in supplementary proceedings—When vacated.

Where a judgment has been obtained in a justice's court in another county and a transcript filed in the county clerk's office in said county, a transcript of the docket of which is filed in New York county, the execution in New York county must be issued by the county clerk out of the court of common pleas, and an order for the examination of a judgment debtor in such a case will be vacated, where it is founded on the return unsatisfied of an execution issued by the county clerk out of the supreme court and tested in the name of one of the judges thereof.

(*Decided, December* 8, 1884.)

Motion to vacate an order for the examination of a judgment debtor.

The plaintiff, on the 25th day of August, 1884, recovered a judgment against the defendant in a justice's court in the town of New Brighton, county of Richmond, New York, before WM. J. CASEY, Esq., Justice of the Peace, for $56.52. A transcript of said judgment was thereafter filed in the office of the county clerk of Richmond county,

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and thereafter a transcript procured from said Richmond county clerk's office, was filed in the office of the clerk of the city and county of New York. Thereafter, on the 18th day of September, 1884, an execution out of the supreme court, and tested in the name of NOAH DAVIS, Presiding Justice, in the first judicial district, was issued to the sheriff of New York county. The order sought to be vacated was founded on the return of this execution unsatisfied.

The defendant moved in the court of common pleas to vacate the order, on the ground that the execution should have been issued out of that court by the county clerk, instead of out of the supreme court.

Leopold Wallach, for the motion.

Frank H. Gray, opposed.

The motion was granted by VAN HOESEN, J.; with $10 costs to be deducted from the judgment.

MARX AND ANOTHER, RESPONDENTS, *v.* JONES AND ANOTHER, APPELLANTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, MAY, 1885.

§ 1942.

Joint debtors—Settlement by one of two or more, separately—Instance.

The Code of Civil Procedure permits joint debtors to compound separately a joint debt, in all cases except where a partnership exists not dissolved, [1, 2, 3] and does not require a strict common law release, but is satisfied by any instrument which exonerates the compounding debtor alone from the liability.[3]

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Morgan v. Smith (70 *N. Y.* 537), distinguished. [4]

Where B., J. and S., copartners in a single undertaking, in the course of it gave six bonds and mortgages to one G., upon which two deficiency judgments were recovered against B. and J. and four against S. and J., and B., after the partnership was dissolved, paid and secured a sum of money, amounting to less than one-half the sum due on the two judgments against J. and B., for which he received from the judgment creditors a receipt, reciting that it was in full for the release of the two judgments against B., and that the settlement was "in full as to" B. "for any interest owned by the parties hereto in the contract with" G. as to B. alone,—*Held*, that this release would operate to diminish J.'s liability to the extent of B.'s portion of the indebtedness, but J. was not thereby discharged from all liability on the judgments. [2, 3]

(*Decided May* 8, 1885.)

Appeal by defendants from order of New York county special term, denying their motion to discharge six certain judgments of record.

The opinion contains a sufficient statement of the facts.

Alexander Thain (*Thain & Kearney*, attorneys), for defendants-appellants.

The acceptance by the plaintiffs of a bond and mortgage of a third person from one of the joint debtors, and the acknowledgment of satisfaction to that debtor not only of the judgments, but as well of claims under the contract with William Gussow, out of which the cause of action arose, was an accord and satisfaction, and discharged the indebtedness of all. Boyd *v.* Hitchcock, 20 *Johns.* 76; Douglass *v.* White, 3 *Barb. Ch.* 621; Kellogg *v.* Richards, 14 *Wend.* 116; Frisbie *v.* Larned, 21 *Id.* 450; Howard *v.* Norton, 65 *Barb.* 161; Booth *v.* Smith, 3 *Wend.* 66; Bliss *v.* Schwartz, 64 *Barb.* 215; Keeler *v.* Salisbury, 33 *N. Y.* 648.

The fact that the debt affected by the receipt of

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the security or obligation of a third party is a judgment debt is not important. State Bank *v.* Fletcher, 5 *Wend.* 85; Jones *v.* Ransom, 3 *Ind.* 327; Sanders *v.* Branch Bank, &c., 13 *Ala.* 353.

Plaintiffs are not saved by the claim that the release is not under seal, or by asserting that the compromise is under the Code. The partners are sureties for each other. At common law a discharge of one operated as a discharge of all. 1 *Parsons on Contracts*, pp. 26, 29; 2 *Kent's Com.* (10 ed.) 508, *note;* Evans *v.* Pigy, 3 *Colden* (Tenn.) 392; Strong *v.* Holmes, 7 *Cow.* 224; Wallace *v.* Kelsall, 7 *Mees. & Wels.* (Eng. Excr.) 264. An accord and satisfaction may be sufficient without a written or formal release. Pacific Mail S. S. Co. *v.* Irwin, 67 *Barb.* 277.

Samuel Untermeyer (*Guggenheimer & Untermeyer*, attorneys).

Cited, in support of contention that the release, being parol and not a formal release, did not discharge the other debtors: Irvine *v.* Millbank, 56 *N. Y.* 635; Morgan *v.* Smith, 70 *Id.* 537.

DAVIS, P. J.—The motion in this case was made upon the alleged ground that Brennan, Jones and one Spaulding were copartners, and that the judgments recovered against Brennan and Jones were upon copartnership transactions. Brennan had compromised the two judgments against him and Jones by paying and securing $5,500, on doing which a receipt was given which read as follows:

"Received, New York, January 23, 1885, from Michael Brennan certified check for one thousand dollars, and a bond and mortgage executed by Margaret A. and Michael Brennan to Randolph Guggenheimer and Solomon Marx for the sum of forty-five hundred dollars, being in full for the release of two

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judgments against Michael Brennan, amounting to $11,460.00. And I hereby agree to deliver said release, executed by both parties, by January 24, at 12 o'clock.

"This settlement to be in full as to Michael Brennan for any interest owned by the parties hereto in the contract with William Gussow as to M. Brennan alone.

"January 23, 1885. Attorney."

Whether any other instrument or any formal release was delivered does not appear by the papers.

Brennan, Jones and one Spaulding had entered into a joint undertaking to erect six buildings upon certain lands covered by mortgages and to share the losses and profits equally. They were not copartners generally, but were jointly interested as such in this single undertaking. Spaulding, Brennan and Jones contracted all obligation to Gussow in the course of erecting the said buildings, to secure which Brennan executed two mortgages to Gussow, and Spaulding executed four mortgages to Gussow. These mortgages were afterwards foreclosed by separate actions upon each. In the four actions upon the mortgages executed by Spaulding, Brennan was not made a party, and in the two actions upon the mortgages executed by Brennan, Spaulding was not made a party, but in all of the said suits Jones was made a party. In each of the actions judgment for deficiency was rendered against Spaulding and Jones or Brennan and Jones, as they, respectively, were parties thereto. The copartnership had been dissolved by mutual consent before Brennan compromised for his liability upon the two judgments obtained against him.

It is claimed on the part of the appellant Jones that the fact of the compromise and execution of the receipt or release, as it is called in the papers, is to

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discharge him from all obligations from the several judgments, and he asks for an order carrying that claim into effect by discharging the judgments as to him. By section 1942 of the Code of Civil Pro-
[*] cedure it is provided that "a joint debtor may make a separate composition with his creditor as prescribed in this section. Such a composition discharges the debtor making it, and him only. The creditor must execute to the compounding debtor a release of the indebtedness, or other instrument exonerating him therefrom.

[*] "A member of a partnership cannot thus compound for a partnership debt until the partnership has been dissolved by consent or otherwise. In that case, the instrument must release or exonerate him from all liability incurred by reason of his connection with the partnership. An instrument specified in this section does not impair the creditor's right of action against any other joint debtor, or his right to take any proceeding against the latter, unless an intent to release or exonerate him appears affirmatively upon the face thereof." The copartnership having been dissolved, no reason is apparent why this section is not applicable in this case.

[*] The Code permits joint debtors to compound separately in all cases except where a partnership exists not dissolved by consent or otherwise. It does not require a strict common law release, but is satisfied by any instrument which exonerates the compounding debtor alone from his liability. It was held in
[*] Morgan *v.* Smith (70 *N. Y.* 537), before the enactment of this section, that a release by parol (which is any release not under seal) of one joint debtor would not discharge the other, and could be pleaded only by the one to whom it was given. In this case there was no attempt by Brennan to compromise anything except the judgments which were against him-

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self and Jones, and it seems to have been distinctly understood that the release was to affect his liability only.

[*] Of course it would operate to diminish Jones' liability to the extent of Brennan's portion of the indebtedness; but upon the facts as they appeared, and as the law as it is now established by the Code and by the authority above cited, we see no ground upon which it can be claimed that Jones, by the transaction in respect to this judgment, was discharged from any liability upon any of the several judgments against him.

We think the order was right, and should be affirmed, with $10 costs and disbursements.

DANIELS, J., concurred.

STERN, APPELLANT, *v.* KNAPP, RESPONDENT.

N. Y. SUPERIOR COURT, GENERAL TERM, MARCH, 1885.

§ 723.

Motion for leave to amend pleading.

Where a notice of motion for leave to amend a pleading only asks "for an order permitting the plaintiff to amend his complaint," and no copy of the proposed amended complaint is served with the motion papers, for want of such service the motion should be denied.

(*Decided March* 30, 1885.)

Appeal from an order denying motion by plaintiff for leave to amend his complaint.

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The application was based on an affidavit, the pleadings in the case, and a notice of motion, which merely asked "for an order permitting the plaintiff to amend his complaint herein."

Louis J. Grant and *Arthur Furber*, for appellant.

Herman Knapp, *Martin & Smith*, and *George H. Strong*, for respondent.

INGRAHAM, J.—Without determining whether an order refusing to allow a party to amend the complaint is appealable, we think the order appealed from should be affirmed.

The application to amend was made upon the affidavit of the plaintiff and the pleadings in the action. No amended complaint, as proposed by the plaintiff, was served with the papers on which the motion was made, nor presented to the court on the argument. The court below was compelled to spell out, from the affidavit, the nature and extent of the proposed amendment.

In applications of this kind, addressed to the discretion of the court, it is the duty of the court to determine whether the application is made in good faith, and to refuse to allow a pleading to be amended if it appears that the pleading as amended would be clearly frivolous, or in violation of any settled rules of pleading. This examination cannot be made, unless the court has before it the pleading as it is proposed to be amended; and as the plaintiff did not, in this case, present a complaint amended as he proposed, the court below was right in refusing to entertain the application.

For the reason above stated, and without examining the other objections raised by the respondent, we

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think the order appealed from should be affirmed, with $10 costs and disbursements.

SEDGWICK, Ch. J., concurred.

MATTER OF THE PETITION OF PRESCOTT HALL BUTLER, AS ADMINISTRATOR, &c.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM, NOVEMBER, 1884.

§ 2344.

Committee of lunatic—Jurisdiction of court over.

A committee of the estate of a lunatic is an officer of the court by which he is appointed, in the same manner as a receiver, and cannot during the life-time of the lunatic be called on to account in another court.

Notwithstanding the provisions of section 2344 of the Code of Civil Procedure, the court, by which the committee of a lunatic's estate was appointed after the death of the lunatic during his incompetency, necessarily retains exclusive jurisdiction of the proceeding and the fund in the hands of the committee, until his accounts are finally adjusted and settled. *A fortiori*, this is so where a proceeding to compel the accounting of the committee is pending in the court in which he was appointed, instituted prior to a proceeding for that purpose brought by the administrator of the lunatic in another court.

The above principles applied to a case where the committee was appointed by the court of common pleas and an accounting was sought to be had in the supreme court.

(*Decided June* 25, 1885.)

Appeal from an order denying motion for leave to discontinue the proceedings herein.

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Mr. Butler, as administrator, &c., of Bomajee Byranjee Colah, petitioned this court on the 18th day of December, 1882, for an order directing Nathaniel Jarvis, Jr., as committee of the estate of the said Colah, to account. Mr. Jarvis was appointed committee of Colah by this court on the 20th of July, 1870. On the said 18th of December, 1882, Mr. Jarvis appeared and consented to the entry of an order for an accounting, and an order was accordingly entered by which he was directed to render his account, and referring the matter to Frank E. Randall, Esq., as referee, to examine the same and report thereon. No proceedings appear to have been taken under the said order. On the 24th of January, 1884, Mr. Butler obtained an order, without notice to Mr. Jarvis, discontinuing this proceeding on payment of costs. On January 25, 1884, an action was commenced by Mr. Butler against Mr. Jarvis for an accounting, in the supreme court. The said order of discontinuance of January 24 was vacated by the special term of this court on the 8th day of February, 1884, and the order vacating the same was afterwards affirmed by the general term of this court. Mr. Butler thereafter moved for leave to discontinue proceedings for an accounting, upon notice to Mr. Jarvis and his attorneys. This application was denied, and from the order entered on such denial this appeal is taken.

Evarts, Southmayd & Choate and *Stephen A. Walker*, for petitioner, appellant.

Vanderpoel, Green & Cuming and *H. W. Bookstaver*, for respondent.

ALLEN, J.—That the committee of the lunatic is an officer of the court in the same manner as a receiver, has been determined in this court (In the Matter of

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Colah, 6 *Daly*, 51). The committee, being such officer, could not, during the lifetime of the lunatic, be called upon to account in another court, this court having first exercised its power and having acquired complete and exclusive jurisdiction over the lunatic and his estate.

Colah being dead, it is contended that Mr. Jarvis is no longer an officer of the court by virtue of his appointment as committee, because section 2344 of the Code provides that "Where a person, of whose property a committee has been appointed, dies during his incompetency, the power of the committee ceases, and the property of the decedent must be administered and disposed of as if a committee had not been appointed."

The court, however, must necessarily retain jurisdiction of the proceeding and the fund in the hands of a committee until his accounts are finally adjusted and settled.

In the Matter of Clapp, 20 *How. Pr.* 385, the court say:—"The proceeding for the adjustment of the accounts of the committee is incidental to the jurisdiction acquired and exercised over the property of the alleged lunatic. Until accounts of the committee are closed and the fund directed to be handed over, they and the fund in their hands remain necessarily under the control of the court. The court must protect its officers, acting in such cases, and must possess all the requisite authority and jurisdiction for that purpose." It would seem, therefore, that this court, having first acquired jurisdiction over the affairs of the lunatic, must maintain it until its whole duty in reference to them has been discharged—which can only be when it has adjusted the accounts of the committee and handed over the estate to the legal representatives of the deceased.

But assuming that the jurisdiction of this court is

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not exclusive in the matter of the accounting of Mr. Jarvis, the object of the suit in the supreme court and of the proceeding in this court is the same. The proceeding in this court was first commenced. All that can be accomplished in the suit in the supreme court can be effected in the proceeding in this court; the rights and interests of all parties can be ascertained, determined and protected as well in the proceeding here as in the action in the supreme court; and no important reason is given by the petitioner for changing from one forum to another.

An application for leave to discontinue an action or proceeding is addressed to the favor of the court, and the court may, in its discretion, grant or refuse it (In the Matter of the Waverly Water-works Company, 85 *N. Y.* 478).

Under the circumstances of this case, we are not prepared to say that the court has improperly exercised its discretion.

The order appealed from must be affirmed.

J. F. DALY, J., concurred.

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ROOF, RESPONDENT, v. MEYER.

DOLL, APPELLANT.

CITY COURT OF NEW YORK, SPECIAL TERM, FEBRUARY, 1885; GENERAL TERM, APRIL, 1885.

§§ 315, 1365, 1366, 1369, 1405, 3176.

Jurisdiction.—When, of city court of New York not affected by amount demanded.—When judgment irregular but not void.—Execution, when sufficient as to form.

The city court of New York has jurisdiction of any action wherein the complaint demands judgment for a sum of money only, [1] whatever may be the amount claimed, [2] and having acquired jurisdiction it cannot be deprived thereof by any subsequent act; [3] the proceedings can, at the most, be irregular, and errors and irregularities may be amended or disregarded. [4]

Entry of judgment in the city court of New York for the excess of its jurisdiction ($2,000) does not oust the court of jurisdiction, [3, 4] and render the judgment void; [3, 4, 9] and while it is an irregularity to which the judgment debtor may object, [5] is one which may be amended [4, 8, 9, 10] and which cannot be taken advantage of by a third party. [5, 6]

People *ex rel.* Brounson *v.* Marine Court (23 *How. Pr.* 446) [11]; Bullard *v.* Sherwood (85 *N. Y.* 253); [12] McLean *v.* Stewart (14 *Hun*, 472); [13] Allen *v.* Swan (6 *N. Y. Civ. Pro.* 56); [15] distinguished. Rockwell *v.* Carpenter (25 *Hun*, 532), followed. [14]

In the absence of fraud, there being no lack of jurisdiction, a subsequent execution creditor has no standing in court to move to vacate a judgment and execution against his debtor. [7]

An execution issued out of the city court of New York to the sheriff of New York county, which does not recite that a transcript of the judgment was filed with the county clerk is sufficient in form to justify a levy upon personal property, whether a transcript was filed or not. [17]

Where, in such a case, the defects (if such they were) were amended by order, the court will be liberal in sustaining such amendment. [17]

(*Decided at Special Term, February*, 1885; *and at General Term, April* 10, 1885.)

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Motion, at special term, by one Charles Doll, a subsequent judgment and execution creditor of the defendant to set aside the judgment herein; an order amending the same, and an execution, levy and all other proceedings thereunder.

The plaintiff brought this action in the city court of New York to recover $2,226.75, and in default of an answer or demurrer, entered judgment for that amount with interest and costs. Thereafter, he waived the excess of his claim over $2,000 and interest, and obtained an order, *ex parte*, amending the judgment roll so that the judgment should be for $2,000, interest and costs, only. Execution was issued against the defendant's property on this judgment, and a levy made upon personal property which was sold thereunder for about $2,000.

Other facts are stated in the opinion.

F. H. Rodenburg, for the motion.

E. F. Hassey and *H. F. Lippold*, for the defendant.

George Bell, for the plaintiff, opposed.

HYATT, J.—It appears from the moving papers that the plaintiff had a claim against the defendant, and that he brought suit thereon by serving a summons and notice on the defendant on January 23, 1885, three days prior to the commencement of the Doll action. The judgment which was entered thereon was for more than $2,000, but the excess was remitted and the judgment and execution amended *nunc pro tunc*.

The defendant does not object to the validity of the judgment, execution and sale thereunder, nor does the moving party herein attack the same upon the ground of fraud or collusion.

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A subsequent judgment creditor is the only objecting party. He alleges several grounds for setting aside the proceedings in this action; one as to the jurisdiction of the court, and the others relating to alleged defects and irregularities in the proceedings.

Section 315, Code of Civil Procedure, provides
[1] that the jurisdiction of this court extends to any action wherein the complaint demands judgment for a sum of money only.

The language of this section is intended, as its
[2] terms show, to include any money judgment action whatever may be the amount claimed. This court has jurisdiction over all such actions. That the amount claimed does not affect the jurisdiction of this court was held in *In re* Barbour, 52 *How. Pr.* 94; People *ex rel.* Brounson *v.* Marine Court, 23 *Id.* 446.

If jurisdiction vests at the commencement of the
[3] action, it cannot be ousted by any subsequent act. (Koppel *v.* Heinrichs, 1 *Barb.* 449; *McAdam's Marine Court Practice*, (2nd ed.) 36).

Jurisdiction having been thus acquired in this action regularly, all subsequent proceedings can
[4] be, at most, merely irregular, and errors and irregularities may be disregarded or amended. The court cannot be ousted of jurisdiction.

The court having jurisdiction, its judgment is not void, as between the parties, and *a fortiori* as to third parties.

Entry of judgment for the excess of its jurisdic-
[5] tion may have been an irregularity, which the defendant might have objected to; a third party cannot.

Section 1245 of the N. Y. consolidation act,* provides that any portion of a claim may be remitted in this court.

* Laws of 1882, chap. 410. This is a re-enactment, in *hæc verba*, of section 3176 of the Code of Civil Procedure.

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There being no want of jurisdiction in the case
[*] at bar, if there are any defects or irregularities in the judgment or proceedings or execution, they can be taken advantage of only by the defendant.

In the conceded absence of fraud, there being
[*] no want of jurisdiction, a subsequent execution creditor has no standing in court for the purposes of this motion (Gere *v.* Gundlach, 57 *Barb.* 13).

The alleged irregularities and informalities
[*] may be amended or corrected by an order to be entered herein (*Code Civ. Pro.* §§ 723, 724).

The motion to vacate the judgment is denied with $10 costs, and the stay of proceedings vacated.

From the order entered on this decision the junior judgment creditor appealed to the general term of the city court of New York.

F. H. Rodenburg, for junior judgment creditor, appellant.

E. F. Hassey and *H. F. Lippold*, for defendant.

George Bell, for plaintiff-respondent.

McAdam, Ch. J.—The court acquired jurisdiction of the parties by the service of the summons, and
[*] jurisdiction having once attached, there can be no doubt as to the power of the court to amend any irregularity occurring in any subsequent stage of the action.

The action was on contract for goods sold and delivered. The court has jurisdiction of such an action
[*] without regard to the sum demanded. The only limitation on the power of the court is that "the sum for which judgment is rendered in favor of the

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plaintiff cannot exceed $2,000, exclusive of interest and costs as taxed" (*Code*, § 316). The clerk should have entered judgment in the action for $2,000, with interest thereon and costs; but the clerical act of entering judgment for $2,271.27, with interest, was void only to the extent of the excess, which the plaintiff subsequently remitted. The court ordered the judgment, &c., to be amended in this respect so as to conform to the statutory direction. The error, therefore, constituted but an irregularity, which has been defined to be a departure from established practice, consisting not only of rules, but of statutory enactments on the subject, and the irregularities in this case were properly corrected by amendment. The cases cited by the defendant do not conflict with this view.

["] In the People *ex rel.* Brounson *v.* Marine Court (23 *How. Pr.* 446) the application was for a writ of prohibition to prevent the marine court from transcending its jurisdiction, which was then fixed at $500, and the court, in denying the application, said, "There is nothing to show that the court attempted to exceed its powers in rendering judgment for a greater amount than the statute allowed." There is nothing in that case pertinent to the question now under consideration, for the order made reduced the judgment within the statutory limit.

["] Bullard *v.* Sherwood (85 *N. Y.* 253) merely holds, that where the plaintiff has included too much interest in his judgment, the defendant's remedy to correct the error is by motion to open the default, and not by motion to correct the amount of interest; that after default opened, the defendant might make an offer of judgment, and litigate as to the amount of interest.

This merely points out the mode a defendant must adopt to get rid of excessive interest charged in a judg-

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ment by default, and does not deny the power of the plaintiff to voluntarily correct the error.

["] McLean *v.* Stewart (14 *Hun*, 472) was a motion made at special term to correct a judgment of the trial judge, and the court held that the proposed change related to the merits and could only be made after a rehearing before the trial judge.

In Rogers *v.* Ivers (23 *Hun*, 428) the case in 14 *Hun*, *supra*, is referred to in these words: "But that case does not question the power of the court to set aside an unauthorized judgment when the party affected thereby has not been heard or brought before the court for the purpose of considering the questions involved in the judgment." The court might have gone further (if necessary) and held that a plaintiff who has made an error in computation might, by order, correct the error, particularly one in his favor, where no rights were impaired and no injustice done, where the judgment, as in the present case, was by default.

["] Rockwell *v.* Carpenter (25 *Hun*, 532) was a motion made to correct a judgment entered after a trial at special term. While the court held that this could not be done on mere motion, the court (on page 531) said: "Now, I admit to the fullest extent the right of the court to correct what are properly called mistakes; that is, clerical errors, defective papers and the like. For instances, in Mechanics' Bank *v.* Minthorne (19 *Johns.* 244), there was judgment for want of a plea. Therefore the declaration, which was on a promissory note, was admitted. The clerk made a mistake in computing the interest. The court corrected the mistake, even after payment of the judgment. The correction involved no new fact and no new decision of law." So with the error here, the clerk entered judgment for too much. The plaintiff has remitted the excess, the judgment was by default, and the correction involved no new fact and no new

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decision of law. The court had, up to this time, decided nothing, and no attempt was made to change any decision of a trial judge, or to alter any adjudication made by the court on the rights of the parties litigant.

["] Allen v. Swan (6 *N. Y. Civ. Pro.* 56) decides that a justice of the peace, after a verdict for $34.52 in favor of the plaintiff, upon which the justice entered judgment for said amount, with costs, could not be afterward reduced by the justice, even by consent of the plaintiff. This is undoubtedly so; but its application to the power of a court of record to direct its clerk to correct an error in the amount of a judgment entered by default is not so clear, nor can we make the ruling applicable by construction. The cases referred to throw but little light on the question presented by this appeal. We have reviewed them because they were cited as controlling.

["] The appellant also contends that the error committed in entering the judgment for over $2,000 was not the right kind of error to be corrected by the court.

We cannot subscribe to this view. If the plaintiff, in a moment of forgetfulness, had inserted seven instead of six per cent. interest in his judgment, he could have corrected his judgment (entered by default) by an order from the court in which it was entered. True, the statute fixed the rate at six, and the attorney, in violation of it, had inserted seven per cent. He was chargeable with a knowledge of the law, and yet his ignorance of it would, in the case put, have been error, which he might, and ought, to correct upon being apprised of it. The case bristles with technicalities, but no injustice has been done, and we have failed to discover any legal ground which requires us to disturb the order made. The defendant has profited by the error to the extent of over $200, and has no reasonable cause of complaint, that the plaintiff has, perhaps by force of circumstances, been compelled to relinquish

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forever so much of a debt conceded to be honestly owing.

The junior creditor also objects that no transcript of the judgment was filed, and that the execution in consequence did not recite the filing of the transcript.* The execution was levied upon the goods and chattels of the defendant, which were sold to satisfy the plaintiff's judgment, realizing about $2,000. No real estate was levied upon, or attempted to be levied upon. Previous to the revised statutes, a judgment in a court of record in this State was a lien upon the lands of the judgment debtor from the time of the entry of such judgment, whether docketed or not. But, by the statute then in force, if the judgment was not properly docketed, it did not affect the land of the judgment debtor as against subsequent purchasers and mortgagees. Even as to them, however, the docketed judgment was entitled to priority in equity if the purchaser or mortgagee had notice of its existence at the time of his mortgage (Buchan *v.* Sumner, 2 *Barb. Ch.* 165). The personal property of the judgment debtor is bound from the time the execution is delivered to the sheriff (3 *R. S.* [6th ed.] 625, §§ 13-17 ;† Roth *v.* Wells, 29 *N. Y.* 471; Hale *v.* Sweet, 40 *N. Y.* 100; France *v.* Hamilton, 26 *How. Pr.* 180; Bond *v.* Willet, 29 *How. Pr.* 50; *Crocker on Sheriffs*, 413), and not from the time the judgment is docketed.

["] We think the execution was, therefore, sufficient in form to justify a levy upon personal property, whether the transcript was filed or not. But,

* As to form and contents of execution against the property, and necessity of filing transcript, see *Code of Civil Procedure*, §§ 1365, 1366, 1369.

† Same statute, 2 *R. S.* (part 3, chap. 6, title 6, art. 2), 365, §§ 13–17. Repealed by *Laws of* 1877, chap. 417, § 1, subd 3 (5). Substantially the same provisions are contained in the *Code of Civil Procedure*, §§ 1405–1409.

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be this as it may, the defects (if such they were) were amended by order, and the courts have been liberal in sustaining such amendments (Ward *v.* Sands, 4 *Monthly L. B.* 51; Douglas *v.* Haberstro, 2 *N. Y. Civ. Pro.* 186; McIntyre *v.* Sandford, 9 *Id.* 306). For these reasons, and those assigned by the court below, the orders appealed from must be affirmed, with costs.

NEHRBAS and BROWNE, JJ., concurred.

EARLY *v.* EARLY.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM, AUGUST, 1885.

§ 1769.

Action for separation—Referee's fees in, by whom paid.

Where, on a motion for alimony *pendente lite* and counsel fee, in an action brought by a wife for a separation from her husband, a reference of the issues was ordered, and the referee reported in favor of the wife,—*Held*, that the husband should be required to take up the referee's report and pay his fees.
(*Decided August*, 1885.)

Motion by plaintiff that defendant be required to pay referee's fees.

This action was brought by the plaintiff, who is the defendant's wife, to obtain a separation from the defendant on the ground of cruelty. A motion for alimony *pendente lite* and counsel fee being made, a

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reference of the issues was ordered. The referee made a report in favor of plaintiff, his fees amounting to $150. Plaintiff thereupon moved for an order requiring the defendant to pay to her or her attorneys said fees to enable her to take up said report.

Edgar J. Phillips and *Frank M. Avery* (*Phillips & Avery*, attorneys), for the motion.

Charles P. Miller and *Rolin M. Morgan* (*Hoes & Morgan*, attorneys), opposed.

VAN HOESEN, J.—There is but one course to pursue in this matter, and that is to require the defendant to take up the referee's report. That report may or may not be confirmed. The plaintiff may or may not prevail in the action. But the court has ordered a reference for the purpose of informing its conscience. The conduct of that reference has involved a bill for referee's fees. Who is to pay them? The referee is the officer of the court, and must be paid. The party prevailing would under ordinary circumstances advance them. But that party is the wife, who is without means, save such as the husband may provide. Except where it is apparent that the wife's case is without merit, it is the practice of the court to compel the husband to furnish to the wife the means of carrying on her suit. It is said that in this action the wife cannot succeed. As to that I have no opinion to express; but the orderly course of business is to bring before the court the testimony that has been taken, together with the report of the referee. In order to do that, the fees of the referee should be paid. The judge who examines the report and the testimony will determine whether or not alimony should be allowed. But as a preliminary to obtaining that determination, I must order the defendant to pay the fees to the

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referee. Of course, only the legal fees need be paid. Let the proper order be prepared and left with Mr. Jarvis, the clerk, for transmission to me.

JENKINS, AS ADMINISTRATOR, &c., OF JENKINS, DECEASED, *v.* THE CITY OF HUDSON.

SUPREME COURT, THIRD DEPARTMENT, ULSTER COUNTY, SPECIAL TERM, MAY, 1885.

§§ 721, 1166.

Swearing jury—Waiver of—Effect of omission to swear jury on verdict—Use of affidavits of juror to impeach verdict.

The swearing of the jury in an action may be waived, and where the omission to swear them is not objected to it is waived, [1,2] and that notwithstanding one of the parties did not have knowledge of the omission; a party is presumed to know what he could easily have ascertained.[1,3]

Where neither party to an action asks that the jury be sworn, and the trial proceeds and a verdict is rendered without the oath being administered to the jury, the verdict is not irregular and void, if neither of the parties is prejudiced thereby.[1,2,3]

The oath of a juror cannot be received to impeach a verdict, nor are the declarations of a juror after it has been rendered any evidence. [3]

(*Decided May* 16, 1885.)

Motion to set aside the verdict of a jury for irregularity.

The opinion states the facts.

C. A. Baurhyte and *C. P. Collier*, for defendant and motion.

Andrews & Edwards, for plaintiff, opposed.

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WESTBROOK, J.—In this case the plaintiff, whose husband was killed by the upsetting of a load of hay in the city of Hudson, recovered a verdict for $2,500 against the city in an action tried at the Columbia circuit in April, 1885, for negligently causing such death by permitting one of the streets, upon which the deceased was traveling at the time of the accident, to be out of repair.

The defendant now moves at special term to set aside the verdict upon the ground that the jurors were not sworn. In the county of Columbia, as in all the counties of this (the third) judicial district, the practice has been to swear the trial jurors in a body at the commencement of court for the trial of all the civil causes at that circuit. It seems that the clerk neglected this duty at the circuit at which this cause was tried, and, after the selection of the jury, the trial proceeded without anything being done or said as to the swearing of the jury. The trial was begun April 13, 1885; the cause submitted to the jury on the 22d, and the verdict rendered on the 23d. The counsel for the defendant did not learn that the jury was not sworn until the said 23d day of April, about an hour previous to the verdict.

The question which this motion presents is: If a trial proceeds, and a verdict be rendered without a jury being sworn, is such a verdict irregular and void if neither party asked that the oath should be administered? In other words, is the swearing of the jury essential to the validity of the verdict?

The question, though novel in the form in which it is presented—the omission to swear an entire jury—involves no new principle, but one well settled. [1] That which the law required to be done for the protection of a party may be waived, and the failure to object is a waiver. Neither can the failure to object be excused by alleged ignorance, for a party

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is presumed to know what he could easily have ascertained; and if a party wishes for his protection that to be done which the law directs, ordinary diligence requires him to make inquiry whether or not the statute has been complied with, and not to sit with folded arms and assume that others will care for his rights, or to watch, with closed lips, to see if some omission does not occur which will render all that is done of no effect.

The Code of Civil Procedure (§ 1166) declares, "The first twelve persons who appear, as their names are drawn and called, and are approved as indifferent between the parties, and not discharged or excused, must be sworn; and constitute the jury to try the issue."

This portion of the section quoted (it was added to by chap. 234 of the Laws of 1883, by disqualifying jurors related by consanguinity or affinity in the same cases in which judges are disqualified; but requiring the objection to be made before opening the case) is almost a literal transcript of the revised statutes (2 *Edmonds*, 438, § 61*), as indeed the most of the provisions of the Code in regard to jurors are.

[*] The statute and the Code undoubtedly prescribe a rule to be followed, both as to who the twelve jurors are to be, and the administration of the oath; but it was never supposed that in regard to either the requirements could not be waived. If, for example, the first twelve found indifferent were not sworn, but some others were without objection taken, would the verdict be set aside as irregular because the statute requirement that such first twelve must be the jury, is jurisdictional? That portion of the section is as mandatory as the other, and if the objection fails in the one instance it must in the other. And what is

* 2 *R. S.* 420, § 61.

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true of the provisions of this section is equally true of others in regard to the drawing, summoning, selection and qualifications of jurors; and various other provisions regulating the practice of the courts. They all speak of certain things to be done, and yet when those have been omitted in every instance when such omission has been made the ground of a motion, it has been held to be waived by want of the interposition of an objection at the proper time.

In Bennett *v.* Matthews (40 *How. Pr.* 428) the alienage of one of the jurors was made the ground of a motion to set aside the verdict, and, as an excuse for not making the objection upon the trial, ignorance of the fact was urged. The statutes of the State declared an alien "incapable . . . . . of serving on any jury" (3 *R. S.* [5th ed.] 8, § 42), but the court nevertheless denied the motion, holding that the failure to make the objection was a waiver, even though the fact of the alienage of the juror did not "come to their knowledge until after the trial."

So, too, when motions have been made to set aside verdicts upon the ground that one or more of the jurors was related to one of the parties within the degree which rendered jurors incompetent, though the fact was unknown at the time of the trial, it has been held that the failure to object waived the objection (Schuyler *v.* Thompson, 15 *Abb. N. S.* 220; Salisbury *v.* McClaskey, 26 *Hun*, 262.

So, too, it has been held that express statutes as to the mode of selecting a referee, and as to his being sworn can be waived by not making the objection (Whalen *v.* Supervisors, 6 *How. Pr.* 278; Keator *v.* Ulster & Delaware Plank Road, 7 *Id.* 41; Nason *v.* Luddington, 56 *Id.* 172).

In Howard *v.* Sexton (1 *Denio*, 440) it was decided that though a statute of the State require arbitrators to be sworn, yet a procedure with the trial without

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demanding it to be done was a wavier. The opinion of the court, per BRONSON, J., bears directly upon the present motion because he likens the provisions of the statute requiring arbitrators to be sworn, to those requiring judges and jurors also to be sworn, and argues that, because the necessity of an oath can be waived in regard to the latter (judges and jurors) it can be in the case of arbitrators.

The exact question involved in this matter was, however, presented in Hardenburgh *v.* Crary (15 *How. Pr.* 307). One of the jurors in that case had not been sworn, and that fact was unknown to the parties. A motion was made to set aside the verdict on that ground, and the court (HARRIS, J.) held, writing an opinion to sustain it, that the failure to object was a waiver, and that ignorance did not excuse the want of an objection. The fact is, and so Judge HARRIS held, that the language of the statute then in force, which is identical with that of our present Code, required a jury to be sworn in each case; and the practice of swearing jurors in a body for all the issues of a circuit can only be upheld by the absence of an objection to the non-swearing in the case which is tried. When, therefore, the counsel for the defendants undertake to excuse the want of objection by the plea of ignorance, in addition to the answer hereinbefore given,—that what a [*] party can readily know he is presumed to know,—it can also be said that they knew when they commenced the trial of the action that the oath required by the Code—well and truly to try that issue—had not been administered, and therefore, when they proceeded with the trial without demanding its administration, they deliberately, and with knowledge, waived the doing of the very thing on account of not doing which they now move.

The principle is fundamental, that when a court has jurisdiction of the subject matter and the parties, statute and constitutional rights may be waived, and

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the failure to object is a waiver (People *v.* Globe Mutual Life Ins. Co., 60 *How. Pr.* 82; see page 91 and authorities there cited; see also pages 95, 96, 97). There is no reason why that principle is not decisive of this case. It has been applied again and again, as has been shown, in instances very similar to the present, and it would be a grievous wrong, when no injury has been done, to nullify the long and expensive trial which has been had.

If, then, there was no curative statute, this motion should be denied. The Code, however, declares (§ 721): "In a court of record, when a verdict, report, or decision has been rendered, the judgment shall not be stayed, nor shall any judgment of a court of record be impaired or affected, by reason of either of the following imperfections, omissions, defects, matters, or things, in the proofs, pleadings, or other proceedings. . . . 12. For an omission on the part of a referee to be sworn; or for any other default or negligence of the clerk, or any other officer of the court, or of a party, his attorney or counsel, by which the adverse party has not been prejudiced."

[*] It will be observed that the omission to swear a referee is expressly declared not to be fatal to the report. This provision was inserted in 1879 for the purpose, as is declared in the codifier's notes, of quieting "doubts in cases where the direction of section 1016, *post*, had not been followed." Section 1016 is the one which requires the referee to be sworn, and which provides that the waiver of the oath "may be made by written stipulation, or orally. If it is oral, it must be entered in the referee's minutes." Its insertion in that section, and in the subdivision which has been quoted, shows the intent of the section. The neglect to swear the jury was the "default or negligence of the clerk," and as that was inapplicable to the case of a referee, the addition referred to was

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made. As then the neglect to swear a referee does not *per se* vitiate a report or judgment; and as the necessity of an oath to a referee is as great as that to a jury; and as the omission to swear was the "default or negligence of the clerk," it must be held that the want of the oath to the jury in this case does not, unless the party swearing has been prejudiced, vitiate the verdict.

[*] The oath of a juror cannot be received to impeach a verdict, nor are the declarations of a juror after it has been rendered any evidence. The affidavit of the juror, and those stating conversations with another juror, are not received as evidence upon this motion. Excluding those to which reference has been made, as the law clearly requires they should be, there is an entire absence of proof to show that the defendant has been injured. The affidavits, on the other hand, submitted by the plaintiff, as well as the proceedings of the trial, of which the judge writing this opinion has personal knowledge, satisfy him that the defendant has received no injury by the omission to swear the jury, and that therefore section 721 of the Code, as well as well-established practice, requires the denial of this motion.

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ESTATE OF CHARLES MORGAN, DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY, AUGUST, 1885.

§ 2643.

Administrator cum testamento annexo—Who entitled to be appointed—Joining stranger as co-administrator.

Where a testator devised his estate "as provided by the laws of the State of New York in case of intestacy," and those entitled to share therein were his widow, his daughters and his grandchildren,—*Held*, that the legatees, although their interests under the will varied in quantity, were nevertheless of precisely the same grade and character; [1] that no one of them as distinguished from another was one of the principal legatees; [1] that no one of them had any absolute legal right, as such, to be chosen in preference to any other as administrator *cum testamento annexo* of the estate, [2] but the one who, *ceteris paribus*, had the greatest interest in the estate had a superior claim to be appointed such administrator. [3]

The word "principal," in section 2643 of the Code of Civil Procedure, —which provides that where there are no residuary legatees legally qualified to act as administrator, or who will accept, "one or more of the principal or specific legatees so qualified" shall be appointed administrator, with the will annexed,—is not used as synonymous with chief or most important, but has the force and effect rather of the word general, and is meant to be descriptive of all legatees who are neither specific nor residuary. [2]

Where legatees under a will are personally incompetent to be administrators *cum testamento annexo* because of their infancy, any claim to be appointed such administrator that may be made by their guardian is secondary to the claim of an adult legatee legally qualified. [4]

The fact that one applying for letter of administration with the will annexed, is the contestant in a proceeding for the involving the construction of the will, and the ascertainment of the amount to which the several legatees are entitled, does not constitute a dis-

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qualification under the statute prescribing the qualifications of administrators. [6]

A stranger may be appointed co-administrator *cum testamento annexo* with one legally entitled to letters, if the latter consents thereto in writing. [7,8]

(*Decided August* 6, 1885.)

Application by Mrs. Frances E. Quintard for letter of administration *cum testamento annexo* of the estate of Charles Morgan, deceased.

The opinion states the facts.

ROLLINS, S.—Mary J. Morgan, late executrix of this testator's estate, died on the 3d of July last, leaving its assets in part unadministered.

Mrs. Frances E. Quintard, decedent's eldest daughter and a legatee under his will, has applied for the issuance of joint letters of administration with the will annexed to herself, her husband George W. Quintard, and James Rintoul. The right to receive such letters as are here applied for is granted by section 2643 of the Code of Civil Procedure to persons in a testator's estate, according to the following order of priority:

"1st. To one or more of the residuary legatees who are qualified to act as administrators. 2d. If there is no such residuary legatee, or none who will accept, then to one or more of the principle or specific legatees so qualified."

The will of this testator contained but one dispositive clause. That clause gave his entire estate "as provided by the laws of the State of New York in case of intestacy." The persons who thus become entitled to share in the testator's bounty, and the respective interests that they had in the estate upon probate of the will were as follows:

Mary J. Morgan, widow, thirty-ninetieths; Frances E. Quintard, daughter, twelve-ninetieths; Maria L.

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Whitney, daughter, twelve-ninetieths; Richard J. Morgan, grandson, twelve-ninetieths; Montague Morgan, grandson, four-ninetieths; Wm. H. Morgan, grandson, four-ninetieths; Laura L. La Montague, granddaughter, four-ninetieths; Henry W. Harris, great-grandson, three-ninetieths; Henry H. Wilson, great-grandson, six-ninetieths; Maria L. Harris, great-granddaughter, three-ninetieths.

[1] It is evident that the above named persons, though their interests under the will vary in quantity, are legatees nevertheless of precisely the same grade and character. It cannot be said that any one of them, as distinguished from any other, is a "residuary" or a "specific" legatee. Nor is it true that any one of them, as distinguished from any other, is one of the "principal legatees." For the word *principal* [2] when read in the light of the context, is evidently not used as a synonym for *chief* or *most important*, but has the force and effect rather of the word *general*, and is meant to be descriptive of all legatees who are neither specific nor residuary.

[3] I hold, therefore, that no one among this testator's living beneficiaries has any absolute legal right, as such, to be chosen in preference to any other as administrator *cum testamento annexo* of this estate, except as hereinafter indicated.

[4] Of those beneficiaries Mary J. Morgan, Richard J. Morgan, Montague Morgan and Henry H. Wilson are dead. Henry W. Harris and Maria L. Harris are personally incompetent because of their infancy, and any claim that might be made by their guardian is secondary to the claim of an adult legatee legally qualified (2 *R. S.* p. 75, part 2, chap. 6, tit. 2, art. 2, § 33; 3 *Banks' R. S.* 7th ed. 2291; Cottle *v.* Vanderheyden, 11 *Abb. N. S.* 17). The selection must therefore be made from the persons following, unless all of them waive their claims: Mrs. Quintard, Mrs.

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Whitney, William H. Morgan and Laura L. La Montague.

The petition of Mrs. Quintard is not, I understand, opposed by Mrs. Whitney. Mrs. Montague is not herself an applicant for letters. Mr. W. H. Morgan applies for his own appointment as co administrator with the petitioner.

The practical questions for decision, are, therefore, these: 1. Of the persons entitled, shall I appoint Mrs. Quintard, or Mr. W. H. Morgan, or both? 2. Whoever may be selected among the persons entitled, shall any person *not* entitled be joined in the administration as prayed for by several of the parties in interest?

And first, as between Mrs. Quintard and Mr. Morgan, the claim of the former is supported by this very important consideration; that she has much the larger interest in the estate.

Schouler, in his treatise on *Executors and Administrators* (§ 124), declares that when the selection of an administrator *cum testamento annexo* is uncontrolled by statute the rule is to grant letters "to the claimant having the greatest interest under the will."

Our own statute is founded on a practice which was established by the ecclesiastical courts, and which is thus expounded by Sir JOHN NICHOL, in Tucker *v.* Westgarth (2 *Add.* 352): "Where it is discretionary in the court to grant administration to either of two claimants it always decrees it, *ceteris paribus*, to that claimant who has the greatest interest in the effects to be administered." See also to same effect Elwes *v.* Elwes (2 *Lee Cas.* 573).

Redfield, in his *Law of Wills*, says (vol. 3, p. 97): "In the English courts of probate the general rule seems to have been to give administration first to the party entitled to the residue of the goods, and among those of equal degree to the one in seniority, other things being equal."

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[*] Tried by this test, it is manifest that the claim of the petitioner is superior to that of her rival applicant. Those who have appeared in opposition, and who are themselves legally competent to receive letters, have much less interest under the will than those legally competent who support or approve her application. And while there is on the part of several persons now interested in the estate, including the representatives of Mrs. Charles Morgan, some opposition to Mrs. Quintard's appointment, except upon certain conditions as to co-administration, which she has not indicated her willingness to accept, it is nevertheless true that her application is favored by a much larger interest than the interest which has declared itself on the side of Mr. W. H. Morgan.

I should therefore have no hesitation whatever in granting her petition, but for the objection that her relation to a proceeding now pending in the court of appeals, involving the construction of this testator's will and the ascertainment of the amounts to which his several legatees are entitled thereunder, makes her an unfit person to be intrusted with the sole charge of the estate.

[*] As to this objection it may said, in the first place, that the facts on which it is founded do not constitute a disqualification under the statute prescribing the qualifications of administrators. She could insist, in spite of it, upon her absolute right to letters if she were, for example, sole residuary legatee, or if the three persons whose statutory status is the same as her own were all dead or were unwilling to administer.

The standard of incompetency fixed by the written law can alone be applied in passing upon the qualifications of an applicant to whom that law has given priority. And indebtedness to the estate or personal interest in its administration are not of themselves

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grounds of disqualification (Churchill *v.* Prescott, 2 *Brad.* 304).

I might very likely regard Mrs. Quintard's relations to the controversy in the court of appeals as sufficient, other things being equal, to warrant the selection in preference to herself of some person equally entitled, against whom that objection could not be urged, if there were any such person in existence. But there is not; and as between Mr. Morgan and herself, if either is to be entrusted with the administration to the exclusion of the other, I am disposed to give her the preference.

Now it is not, in my judgment, desirable that letters should issue to the two in conjunction. There is little reason to believe that their counsels would be harmonious, or that their united action would result in measures conducive to the best interests of the estate.

Besides, if Mrs. Quintard shall become sole administratrix, I cannot think that the weight of her official authority will become practically oppressive to the other legatees who now object to her appointment.

Those objectors are all parties to the proceeding in the court of appeals, and are represented by able and zealous counsel.

The issues involved have already been the subject of controversy before a referee, the surrogate and the supreme court, and have given rise to searching and elaborate discussion. Under the circumstances, it is extremely unlikely that the parties litigant would or could be helped by the appointment of an administrator in sympathy with their own contention, or would or could be injured by an appointment from the ranks of the opposition.

There remains to be considered the question whether a stranger to an estate can be granted letters of administration *cum testamento annexo* jointly with

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a person entitled to such letters under section 2643 *supra*.

[*] It is an every day practice as regards estates of intestates to appoint strangers as co-administrators upon the nomination of the person entitled to letters. This practice is in accordance with the provisions of section 34, title 2, chapter 6, part 2, Revised Statutes (3 Banks', 7th ed., 2291), which declares that "*Administration* may be granted to one or more competent persons, although not entitled to the same, with the consent of the person entitled to be joined with such person, which consent shall be in writing and be filed in the office of the surrogate."

Whether this section applies to cases of administration with the will annexed, does not seem to have been decided in any reported case, and a doubt is now thrown upon the matter, by the fact that, in the main, the practice and procedure in respect to the appointment of the latter class of officers is now regulated by the Code of Civil Procedure, while as to the administration of estates of intestates the provisions of the Revised Statutes are still in force. This doubt will disappear, however, upon close examination.

Section 34 is one of the original provisions of art. 2, which from the time of its enactment has borne this title: "Of granting letters of administration with the will annexed, and in cases of intestacy."

I agree with Surrogate Bradford, *Ex parte* Brown (2 *Bradf.* 22), in holding that the term "administrator," as used throughout the whole of title 2 of the 6th chapter, was intended to include administrators with the will annexed, except in cases where the context plainly indicates the contrary.

That strangers could be joined in administrations *cum testamento annexo* before the Code came upon the statute book, I have no doubt. Now there is nothing in the Code inconsistent with a continuance of that

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practice, and section 34 is still unrepealed, and still forms a part of article 2.

[*] It will be observed that the surrogate has no authority under that section to depart from the rule of selection established by section 2643 of the Code, except to the extent that the person entitled shall consent in writing to the appointment of co-administrators.

I cannot, therefore, of my own motion, grant letters to the administrator of the late executrix, however strongly I might be inclined to do so. I may add that even apart from the restrictions of the statute, the surrogate would not be justified in forcing upon a person entitled, an association with a stranger not selected by himself (Peters *v.* Pub. Administrator, 1 *Brad.* 200–207, and cases cited).

Letters may issue to Mrs. Quintard, Mr. Quintard and Mr. Rintoul. If the petitioner shall file a written consent for Mr. Moir's inclusion, he also may be granted letters.

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MOFFETT *v.* DEOM.

CITY COURT OF NEW YORK, CHAMBERS, MAY, 1885.

§ 3229.

Offer of judgment—Who entitled to costs upon acceptance of, for less than fifty dollars.

Where the defendant in an action on contract in a court of record offered to allow judgment for $35, with costs, and the plaintiff accepted the offer,—*Held*, that neither party was entitled to costs; that as the recovery was less than fifty dollars, there was no authority in the statute entitling the plaintiff to any costs, and the defendant, by making the offer, waived his statutory right thereto.

Johnson *v.* Sagar (10 *How. Pr.* 452), distinguished.

(*Decided May* 9, 1885.)

Motion for new taxation of costs.

The action was upon contract. Other facts are stated in the opinion.

MCADAM, Ch. J.—The plaintiff sued to recover $56, and the defendant served an offer to allow judgment for $35, "with costs." The plaintiff accepted the offer and served a bill of costs, with notice of taxation. The defendant also served a bill of costs, with notice of taxation. The question therefore presented is, whether either, and which, of the parties is entitled to costs. The offer in effect provides that the costs are to go to the plaintiff, but this must be construed to mean the legal costs to which a plaintiff is entitled in an action upon contract, and as the recovery is less than $50, there is no authority in the statute entitling the plaintiff to any costs (*Code*, § 3228; Johnson *v.* Sagar, 10

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How. Pr. 452). The defendant claims that as the plaintiff is not entitled to costs, the defendant is entitled to them as of course (*Code*, § 3229). Ordinarily, this result would follow ; but where the defendant, by an offer in writing, stipulates that the plaintiff may have costs, effect can be given to this part of the stipulation only by holding that if the plaintiff is not entitled to the costs, the defendant has by his voluntary act waived his statutory right to them, and this I hold he has done in this case.

It is familiar law that a party may waive a statutory or even constitutional right in his favor, and where he has led his adversary to act upon his stipulation or waiver to his prejudice, he cannot afterwards be permitted to set up a claim in opposition to it. In Johnson *v.* Sagar (*supra*), "the defendant claimed costs in his offer," and the plaintiff having elected to accept such an offer for $49.50, the court properly held that the defendant, after its acceptance by the plaintiff, was entitled to his costs as of course. There was no waiver in that case, and it was properly decided. The plaintiff in that case might have treated the conditional offer as a nullity, but he chose to accept it and could not afterwards complain of its form or legal effect. The clerk may therefore enter judgment in favor of the plaintiff for $35, the amount of the offer, but without costs to either party.

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DURANT *v.* ABENDROTH.

VAN DOLSEN *v.* ABENDROTH.

N. Y Superior Court, Special Term, September, 1885.

§§ 784, 785, 1300, 1303.

Appeal—Power of court to extend time of and to supply defects in.—Wavier.

Where, from inadvertence or other cause, no notice of appeal is served, within the time allowed, either on the clerk of the court or the attorney for the adverse party, the court has no power to grant relief from the effect of such omission, except as provided in section 785, viz.: in case of death of a party entitled to appeal, etc.

The only section authorizing the court to supply defects in the proceedings necessary to perfect the appeal, is section 1303, providing for a case where the appellant, seasonably and in good faith, serves a notice on either the clerk or the attorney, and omits, through mistake, inadvertence or excusable neglect, to so serve the notice on the other, or to do any other act necessary to perfect the appeal, in which case the court may, in its discretion, permit the omission to be supplied.

Where a notice of appeal was not served within the time fixed by law, either on the clerk or the attorney, a stipulation extending the time to serve a proposed case, etc., is not a waiver of the right to insist that no appeal has been taken; where it appears that the attorney, at the time of granting the extension, refused to receive a notice of appeal on the express ground that the time in which to serve it had expired.

Staats *v.* Garnett (21 *Week. Dig.* 39), distinguished.

(*Decided September* 17, 1885.)

Motion to vacate execution and stay all proceedings on the part of the plaintiff to enforce the judgment in this action, until the hearing of the general term.

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The facts sufficiently appear in the opinion.

Arnoux, Ritch & Woodford, for the motion.

Norwood & Coggeshall, opposed.

INGRAHAM, J.—The only question to be determined on this motion is, whether or not an appeal has been taken from the judgment below within the time allowed by law.

By section 1300 of the Code an appeal must be taken by serving on the attorney for the adverse party, and upon the clerk, a written notice to the effect that the appellant appeals from the judgment, or order, or from a specified part thereof. No such notice was served within thirty days from the service of notice of entry of judgment.

The only section of the Code authorizing the court to supply defects in the proceedings necessary to perfect the appeal is section 1303, which provides that where the appellant seasonably and in good faith serves a notice of appeal, either upon the clerk, or the party, but omits, through mistake, or inadvertence or excusable neglect, to serve it upon the other, or to do any other act necessary to perfect the appeal, the court may in its discretion permit the omission to be supplied.

The power granted by this section, however, is only where the notice of appeal has been served either upon the clerk, or upon the adverse party within the time allowed by the Code; and in this case, as no notice of appeal was served within the thirty days after the notice of entry of judgment, no power is given by this section to permit the defendant to serve the notice.

The only remaining question is, whether the consent of the plaintiff extending the time of the defendant to serve a proposed case and exceptions, was a

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waiver of the notice of the entry of the judgment, or of the right to insist that no appeal had been taken within the time allowed.

It appears, however, in this case that at the time the consent was given, the plaintiff's attorney expressly refused to receive a notice of appeal, on the ground that the time in which to serve the notice had expired; and having taken that position, it is difficult to see how they could have intended to waive the right which they expressly insisted upon by granting the stipulation.

The case of Staats *v.* Garnett (21 *Week. Dig.* 39), cited by the defendant, was very different from the case at bar.

There the notice of appeal had been served and accepted by the respondent without objection, and the court held that the consent extending the time to make a case, was a confession or admission that the notice of appeal had been received in time, or at least a confession that the notice of entry of judgment was for some cause ineffectual.

In this case, however, the plaintiff's attorney had refused to receive the notice of appeal, refused to waive the default, and insisted that no appeal had been taken. Under such circumstances, it cannot be held that there was any waiver.

The failure to serve the notice of appeal in this case was evidently a mistake on the part of defendant's attorneys, or some one in their employ, and upon the facts shown, would justify the court in relieving the defendant from the effect of such mistake, if it were in the power of the court.

Section 784 of the Code provides "that the court or a judge cannot allow either of those acts," viz.: the commencement of an action or the taking of an appeal, "to be done, after the expiration of the time fixed by the law for doing it," except in a case specified in the

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next section, which does not apply to the case at bar. The court has no power, therefore, to relieve the defendant from the effect of the failure to serve the notice of appeal within the time allowed.

I have examined the questions presented on this motion without regard to the claim on the part of the plaintiff, that the question has been passed upon by Judge O'GORMAN, and having come to the conclusion that no appeal from the judgment has been taken, it is unnecessary to determine whether or not the questions were included within such decision.

The motion must be denied.

SEYMOUR *v.* LORILLARD.

SUPERIOR COURT, SPECIAL TERM, SEPTEMBER, 1885.

§ 484.

Pleading—Joinder of cause of action on warranty with one on false representation, demurrable.

A complaint containing a cause of action upon a warranty as to a chattel, and also a cause of action for a false representation in respect of such chattel, is demurrable for misjoinder. One cause of action is based upon the false representations, and sounds in tort, while the other is founded on the contract between the parties, and the two cannot be said to "arise out of the same transaction," though the false representation be as to a matter covered by the warranty.

(*Decided September* 24, 1885.)

Demurrer to the complaint, on the ground that causes of action have been improperly united therein.

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The facts appear in the opinion.

John E. Parsons, for defendant.

Roger A. Pryor, for plaintiff.

INGRAHAM, J.—The opinion of the general term on the appeal from the order denying the defendant's motion to compel the plaintiff to make an election between the two causes of action stated in the complaint, does not dispose of the question raised by this demurrer.

The court says in its opinion, "If the complaint be demurrable, the defendant should go at once to the specific remedy pointed out by the Code" (Seymour *v.* Lorillard, 51 *N. Y. Super. Ct.* 399).

The court held that the two causes of action are not inconsistent, but in order to render it proper to unite them in the same complaint they must not only be consistent with each other but must be upon claims arising out of the same transaction, or transactions connected with the same subject of action (*Code*, § 484, subd. 9).

Whether or not, under this provision of the Code, causes of action upon a contract and tort can be united in the same complaint, has been much discussed, and many conflicting decisions can be found in the books.

In N. Y. & New Haven R. R. Co. *v.* Schuyler (17 *N. Y.* 604), Judge COMSTOCK says of this clause, "Its language is, I think, well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretation which shall be found most convenient and best calculated for the ends of justice."

But did the two causes of action set up in the complaint arise out of the same transaction, or trans-

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actions connected with the same cause of action? The first cause of action alleges that the defendant, having offered to sell plaintiff a certain steam yacht, did, with intent to deceive and defraud plaintiff, as he is informed and believes, falsely and fraudulently represent that the said yacht did not leak and was sound and in perfect condition. That said plaintiff, relying on said representation, purchased the yacht of defendant and paid therefor the sum of $65,000.

This cause of action is in tort, and is based upon the representation, as to the condition of the yacht that was made, and the liability of defendant attaches, not upon the sale of the yacht or the contract that was made between them, but upon the false and fraudulent representations made. The defendant would be liable to the plaintiff for all damage he sustained in consequence of those false representations, whether the sale had been subsequently consummated or not. The cause of action, therefore, is the representation made by defendant to plaintiff.

The second cause of action alleges that the defendant in offering to sell said yacht to the plaintiff, and as an inducement thereto, warranted the yacht not to leak and to be sound and in perfect condition, and the plaintiff, relying upon said warranty, then and there purchased the yacht of defendant, and paid him therefor the sum of $65,000.

This cause of action is on contract for the breach of the warranty, and is based upon the contract between the parties. It has nothing to do with the false and fraudulent representations alleged in the first cause of action, and did not rise out of the transaction upon which the first cause of action is based.

This view has been sustained by many cases in the State, and appears to me to be the one based upon sound reason.

In Sweet *v.* Ingerson (12 *How. Pr.* 331), the plaintiff in

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one count of his complaint, claimed to recover for the breach of a contract of warranty on the sale of a horse, and in the second, claimed damages for the fraudulent representations in regard to the quality and condition of the same horse. The court held that in that case, the subject of the action is either the contract of warranty or it is the fraudulent concealment of the defect complained of; these causes of action cannot consist with each other—they demand a totally different line of proof and different judgments and different processes for enforcing a final recovery; and the demurrer was sustained.

This case was followed in Springstead *v.* Lawson (14 *Abb. Pr.* 328); Quintard *v.* Newton (28 *N. Y. Super. Ct.* 80); Teall *v.* City of Syracuse (32 *Hun*, 332); and in Hubbell *v.* Meggs (50 *N. Y.* 487), the court of appeals held that an action in tort and an action on contract for money had and received by defendant for the use of the plaintiff could not be joined. In Wiles *v.* Suydum (64 *N. Y.* 173), in speaking of the action on contract and an action for a penalty, the court says, "The causes of action are independent of each other. The transactions are different, and there is no legal affinity between them. The language of the last clause is more applicable to equitable actions where the controversy is in respect to specific property, real or personal. It is difficult to define in these cases the subject of the action. The object of the action is to recover the debt; but is the debt the subject of the action? In some sense it perhaps may be so regarded; while in another the subject of the action may be regarded the penalty or forfeiture. If the former, there is no natural connection between it and the transaction creating the liability. If the latter, it has no connection with the transaction as against a defendant as a stockholder. It may be convenient for the plaintiff to combine the two causes of action, but looking at

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the rights of both parties and the rules of law, we cannot think the Code was designed to authorize their union in one complaint."

Applying what was said in that case to the case at bar, I think it must be held that the causes of action should not be united in the same complaint. The cause of action on the tort arose out of the false representations, and the cause of action on the warranty arose out of the contract of sale. The proof to sustain the two causes of action would be in many essential respects entirely different. The remedies to enforce any judgment recovered would not be the same.

I am of the opinion, therefore, that the demurrer should be sustained, with costs, with leave to plaintiff to amend within twenty days, on payment of costs.

JAYNES, RESPONDENT, *v.* JAYNES, APPELLANT.

COUNTY COURT OF ORLEANS COUNTY, JUNE, 1885.

§§ 728, 1294, 1295.

Appeal—When acceptance of fruits of judgment is not waiver of right to —Title of papers where appeal taken to county court from a judgment of a justice of the peace.

Where, in an action to recover chattels, in which the chattels claimed were replevied, the judgment awarded a part of the chattels to the plaintiff, and directed the return of a part thereof to the defendant, who claimed that the court was without jurisdiction,—*Held*, that the defendant did not waive his right to appeal from such judgment by accepting the chattels awarded to him thereby, when tendered, without demand, by the plaintiff.[1,1]

Bankard *v.* Babcock (27 *How. Pr.* 391);[2] Dyett *v.* Pendleton (8 *Cow.* 727);[3] Higbie *v.* Westlake (14 *N. Y.* 281), followed. Bennett *v.*

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Van Syckle (18 *N. Y.* 480); Knapp v. Brown (45 *Id.* 207), distinguished.[*]

It seems, that in every case where an appellant has been held to have estopped himself from prosecuting an appeal by availing himself of the fruits of the judgment, either the provisions were so dependent on each other that availing himself of any part was entirely inconsistent with his appeal, or he had taken active steps to enforce a judgment which he sought wholly to reverse, and no case of a voluntary payment or voluntary delivery of property without any steps being taken by the appellant to enforce the judgment has been held an estoppel or waiver, especially where not inconsistent with what he sought to accomplish by the appeal.[*]

Affidavits used on a motion to dismiss an appeal from a justice's to a county court should be entitled in the county court; but where they are incorrectly entitled in the justice's court the error will be disregarded if the opposite party is not misled thereby.[*]

(*Decided June*, 1885.)

Motion to dismiss an appeal from a judgment of a justice of the peace.

The opinion states the facts.

Henry D. Tucker, for plaintiff-respondent, and motion.

Sawyer & Bullard, for defendant-appellant, opposed.

SIGNOR, Co. J.—This is a motion made by plaintiff to dismiss an appeal by defendant from a judgment entered on a verdict of a jury by DAVID N. PETTENGILL, a justice of the peace of the town of Clarendon. The action was one for the claim and delivery of certain articles of personal property, viz., a horse, a plow, a drag and a buggy. The plaintiff commenced proceedings in the justice's court and obtained possession of the property by the usual replevin proceedings. The affidavit stated the value of the articles to be $240. The judgment allowed plaintiff to retain the horse, plow and drag, but directed the return of the buggy to

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defendant, or in case of its non delivery, the payment of the sum of $60, which was the value found by the jury. It is claimed by plaintiff that the buggy was delivered by plaintiff's direction to defendant on the day succeeding the trial and accepted by him, and that by such acceptance he waived his right to appeal.

The defendant denies that there was any delivery to or acceptance by him, but sets out in his affidavit what he claims actually took place, and on his own statement of the facts I think they amount to a delivery and acceptance. The question then arises, did he, by such delivery and acceptance, waive his right to appeal? It appears that the defendant took no part in directing the entry of the judgment, but insisted by his counsel that the justice had no jurisdiction in the premises, and that since the entry of the judgment he has taken no steps to compel an enforcement of the same. The delivery was a voluntary one by the plaintiff. The defendant claims that the judgment being void on the face of the return, there was no delivery under the judgment, and hence he is not bound by it. I think that if the justice had [1] not exceeded his jurisdiction, and the judgment had been valid, that defendant would not have waived his right to appeal by what took place.

In Benkard *v.* Babcock (27 *How. Pr.* 391), the [2] question of what constituted a waiver of the right to appeal by the appellant's availing himself of the judgment is considered and authorities reviewed, and ROBERTSON, Ch. J., says of the cases cited: "They will all be found to be cases where an appellant had attempted actively to enforce either the whole of a judgment, order or decree in his favor or else some part thereof connected with and dependent upon such other part thereof, as he may have appealed from; or else when he had availed himself of some benefit or favor granted or offered to him by such judgment,

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order or decree as an alternative to exercising the right of appeal." In that case plaintiffs had recovered a judgment for a sum of money and costs, but, being dissatisfied with the amount of the verdict, appealed. The amount of the judgment and costs was tendered by the defendant and accepted by the plaintiffs, and on the ground that by the acceptance the plaintiff had waived the right to appeal, a motion to dismiss the appeal was made and denied.

The present case might be different had the defendant actively enforced the judgment in his favor, yet it may be questioned whether the parts of the judgment were so connected that this would have prevented his appealing. Had plaintiff tendered him the $60 fixed as the value of the buggy, instead of the buggy, the reasoning would be the same as in Benkard *v.* Babcock, and I cannot see why the same principle does not apply when the specific property is tendered instead of the value.

[*] In the case of Dyett *v.* Pendleton (8 *Cow.* 727), COLDEN, Senator, said, "This case is certainly not so strong for the motion as if the money had been paid or collected on execution, and I never heard that either would be a reason against a writ of error."

It is stated in *Wait's Practice*, vol. 4, p. 216, that it has been held that the acceptance by the appellant of money or other property awarded to him by the decree, does not take away his right to appeal therefrom, and this is so held, on the ground that such payment is in the nature of payment on account." Section 3058 of the Code of Civil Procedure makes provision for the restitution of any rights or property lost by erroneous judgment.

[*] In Higbee *v.* Westlake (14 *N. Y.* 281), it was held that the acceptance by a person of that to which he was unquestionably entitled, though he ac-

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cepted it under a decree, did not estop him from appealing therefrom.

In Bennett *v.* Van Syckle (18 *N. Y.* 480), and in Knapp *v.* Brown (45 *N. Y.* 207), it was held that the appellant had waived his right to appeal. In the former case, it was on the ground that all the provisions were so connected and dependent that the appellant's enforcing a portion was inconsistent with his right to appeal; and in the latter case the appellant sought to recover the entire judgment, and it was held that by *issuing an execution* to *enforce* the judgment, the appellant waived his right to appeal.

From my examination of the authorities, I think it will be found that in every case where an appellant has been held to have estopped himself from prosecuting the appeal by availing himself of the fruits of the judgment, either the provisions were so dependent on each other that availing himself of any part was entirely inconsistent with his appeal, or he had taken active steps to enforce a judgment which he sought wholly to reverse, and that no case of a voluntary payment or voluntary delivery of property, without any steps being taken by the appellant to enforce the judgment, has been held an estoppel or waiver, especially where not inconsistent with what he sought to accomplish by the appeal.

In this case, defendant claimed the justice had no jurisdiction, and that the judgment was void, and by his counsel had announced his intention to counsel for plaintiff to appeal from any judgment in favor of plaintiff. The delivery was made without any steps being taken by defendant to compel the same, and without any request on his part, and I do not think amounted to a waiver.

The affidavits on which this motion was made were entitled in the justice's court, and for this

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reason counsel for the defendant objected to their being read. They should have been entitled in the county court,* but when the opposite party is not misled by entitling the affidavits in the appellate court the error will be disregarded (3 *Wait's Law & Practice*, 972, and cases cited.)†

For the reason herein stated, I think the motion should be denied, with ten dollars costs.

Ordered accordingly.

JAYNES RESPONDENT, *v.* JAYNES, APPELLANT.

COUNTY COURT OF ORLEANS COUNTY, SEPTEMBER, 1885.

§§ 723, 2861, 2862.

Justices' court—Jurisdiction in action to recover a chattel—Necessity of affidavit—Amendment thereof—Value—Appeal where trial court had not jurisdiction.

In an action in a justice's court to recover a chattel, an affidavit stating the value of the chattel is necessary,[2, 7] and in its absence or where it states the value of the chattels to be over $200, the justice does not acquire jurisdiction. [3,7] In the latter case, the affidavit cannot be so amended as to confer jurisdiction,[3,8] but even if valid the mere allowance of an amendment would not be sufficient without an actual amendment. [5]

Irr *v.* Schroeder (6 *N. Y. Civ. Pro.* 253), criticised and not followed. [6]

The jurisdiction of a justice of the peace in an action to recover a

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* See *Code of Civil Procedure*, § 1295.

† Section 728 of the *Code of Civil Procedure* provides, "The want of a title, or a defect in the title of an affidavit, does not impair it, if it intelligibly refers to the action or special proceeding in which it is made."

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chattel does not depend upon the actual value of the property, but upon the value as stated in the plaintiff's affidavit. [1]

Dennis v. Crittenden (42 *N. Y.* 542), followed. [1]

In an action to recover a chattel, the affidavit required to confer jurisdiction on a justice's court or replevy the chattel, must state its value, and the plaintiff is not at liberty to swear that the value is less than it really is, or less than he really believes it to be. [4]

Although a trial court has no jurisdiction of the subject-matter of an action, an appellate court on appeal from a judgment rendered therein has jurisdiction to reverse the judgment on that ground. [8]

Kundolf v. Thalheimer (12 *N. Y.* 593); McMahon v. Rauhe (47 *Id.* 72), followed. [8]

(*Decided September*, 1885.)

Appeal by defendant from a judgment of a justice of the peace.

The facts are stated in the opinion, and other facts are stated in the opinion written on deciding motion to dismiss the appeal, reported *ante*, p. 94.

Sawyer & Bullard, for defendant-appellant.

Henry D. Tucker, for plaintiff-respondent.

SIGNOR, J.—The defendant appeals from a judgment entered in a justice's court on the verdict of a jury, awarding the possession of certain personal property, viz.: "One bay mare three years old, one side-bar covered buggy, one Curtis plow, iron beam, and one spring tooth harrow."

The affidavit presented to the justice stated, "that the value of said property, according to the deponent's best judgment and belief, is $240." The complaint also alleged that the property claimed was of the value of $240. Plaintiff, on the trial, testified that she had sold the horse for $175, and that the plow was worth $14 and the drag $15.

The jury found the value of the buggy to be

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[1] $60. It was however decided in Dennis *v.* Crittenden (42 *N. Y.* 542), that the jurisdiction of the justice did not depend on the actual value, but upon the value of the property as stated in the affidavit. After the summons was served, the parties appeared and several adjournments were had, and a commission was issued and testimony taken. The matter finally came on for trial, and at the close of plaintiff's case counsel for defendant moved for a non-suit, on the ground "that the undisputed value of the property in question is more than $200; that the justice's court has no jurisdiction; that the value of the property stated in affidavit upon which the papers were issued was $240; that section 2862 of the Code does not give jurisdiction, and that the justice had no legal right to issue replevin papers." Plaintiff's counsel then moved to strike out of plaintiff's affidavit to obtain process, the sum of $40. The motion for a non-suit was denied, and the plaintiff was allowed by the court to amend the affidavit or other proceeding under section 723. It is claimed by counsel for the respondent that if the affidavit as originally made conferred no jurisdiction, the proceedings afterwards taken cured the defect.

The appearance of a party would confer no jurisdiction over the subject-matter of the controversy. That, in a court of limited jurisdiction, is only such as is specially conferred by statute (*Code Civ. Pro.* § 2861). Such jurisdiction may not be conferred even by express consent (Dudley *v.* Mayhew, 3 *N. Y.* 9; Burke *v.* Ayres, 19 *Hun*, 24; McMahon *v.* Rauhe, 47 *N. Y.* 72).

It is true that amendments of affidavits are frequently allowed in actions, and such amendments have been allowed by the supreme court in replevin proceedings. Justice's courts possess and exercise a broad power of amendment, but the question arises,

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could the supreme court so amend an affidavit necessary to confer jurisdiction of an action as to confer it, when prior to the amendment it had none. The supreme court is a court of general jurisdiction, and when it acquires jurisdiction of the person in proceedings of this nature, has jurisdiction of the subject-matter by reason of its general powers. The affidavit in replevin in that court confers no jurisdiction, but is a prerequisite to the sheriff's authority to take the property into his custody. Under the revised statutes the court acquired jurisdiction to issue an attachment only when an affidavit setting forth jurisdictional facts was presented to the court. The same was formerly true, where application was made for a warrant of arrest, and a warrant issued on an affidavit insufficient to confer jurisdiction would be no protection to the officer issuing it, and the affidavit on which it was issued might not be amended so as to avoid the consequences (2 *Wait's Law & Practice* (3 ed.) 101, 759).

PAIGE, J., in Furman *v.* Walter (13 *How. Pr.* 348) says that attachments issued under the revised statutes were special proceedings and were the original process by which suits were commenced, and as the jurisdiction depended upon the facts set up in the affidavit, the sufficiency of such affidavits was necessarily a jurisdictional question, and if the affidavit failed to state facts necessary to confer jurisdiction, the defect could not be supplied either by an amendment or by supplemental affidavits.

[*] I think the rule to be that where jurisdiction is acquired in some other way, or where the court is one of general jurisdiction, an affidavit in the proceeding may be amended; but where, as in this case, jurisdiction is derived from the affidavit, and may be obtained only by a strict compliance with the statute conferring it, an affidavit may not be so amended as to

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confer jurisdiction, in a proceeding void for want of a proper affidavit, any more than an affidavit could be supplied when none had been before made. An order allowing such amendment in a void proceeding, as was said in Bangs v. McIntosh (23 *Barb.* 61), "would be merely adding another nullity to the prior nullity." Up to the time that a proper affidavit stating a value of the property not exceeding $200 was filed, the justice had no jurisdiction in the matter, and I
[*] cannot see how he could allow any amendment or make any valid order therein.

It does not appear from the return that an amended affidavit was in fact ever made or filed, and on the argument it was stated that none was ever actually made or filed; nor do I see how the plaintiff could have sworn that the *actual* value was $200, after having once sworn that it was $240 and in view of her testimony on the trial. The law requires the value, and a plaintiff is not at liberty to swear that the value is less than it really is, or less than he really believes it to be.
[*] Were it otherwise, by understating the value he might confer jurisdiction on a justice to award him the possession of property worth much more than $240 and when he desired to give a small bond he would only have to make the value of the property correspondingly small. The affidavit is usually all the evidence the justice has upon which to fix the amount of the bond.

[*] I do not think the mere allowance of the amendment, even if valid, would be sufficient without an actual amendment. The parties could not even consent that the justice should have jurisdiction without any affidavit being presented, for where that was done it would be in effect conferring jurisdiction by consent, and where the original was void the failure to file another would be in effect proceeding without any.

In Irr v. Schroeder (6 *N. Y. Civ. Pro.* 253), HAM-

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MOND, J., reviewing Fritze *v.* Pultz (2 *N. Y. Civ. Pro.* 142) and McNeary *v.* Chase (30 *Hun*, 491), holds that where the affidavit fails to state any value of the property, the judgment should be sustained, and cites McNeary *v.* Chase as an authority in support of that proposition; but that case, in my opinion, falls far short of holding that jurisdiction in an action in replevin can be obtained where no value is stated.

I think it goes no further than to hold that as the Code is now enacted, an order of arrest being simply a provisional remedy and the court not acquiring jurisdiction by the affidavit on which the warrant is issued, but acquiring jurisdiction of both persons and subject matter by the service of the summons, when the judgment is sustained by the evidence, it will not be reversed for a defect in the affidavit on which the warrant was issued.

['] It seems to me that the learned judge in Irr *v.* Schroeder overlooked the difference in the relations of the two affidavits to the action in which they may be employed. The jurisdiction in cases where a warrant of arrest may be issued, so far as the action is concerned, being independent of the affidavit,—so much so that no affidavit need be made and no order issued,—while in an action in replevin, the affidavit is what confers jurisdiction and the action cannot be commenced without it. If the plaintiff does not desire a warrant of arrest no affidavit is needed, but in replevin while plaintiff may not desire the order to take possession of the property before the trial, the affidavit is still required to confer the jurisdiction given by subdivision 7, section 2862, which is made dependent on the affidavit.

['] Section 2919 provides when the action may be brought, and provides that it is "subject to the qualifications specified in sections 1689, 1690, 1691 and 1692, and subdivision 7 of section 2862 of this act."

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Subdivision 7 of section 2862, confers the jurisdiction "when the value of the chattel or of all the chattels *as stated in the affidavit made on the part of the plantiff* does not exceed two hundred dollars." I am led to the conclusion that the justice never acquired jurisdiction to commence the action or to allow the amendment, and that the whole proceedings are void for that reason.

It has seemed unnecessary to consider the other questions raised on the appeal, after arriving at this conclusion. The question has sometimes been raised, whether in such a case the appeal should be dismissed leaving the parties to treat the judgment of the lower court as void, or the judgment reversed; but it was held in Kundolf *v.* Thalheimer (12 *N. Y.* 595) and McMahon *v.* Rauhe (47 *Id.* 72), that although the [*] trial court obtained no jurisdiction over the subject matter the appellate court has jurisdiction to reverse the judgment on this ground.

I regard the errors so fatal, which I have discussed, that irrespective of, and without examining into the merits of the case, the judgment must be reversed, with costs.

Ordered accordingly.

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HAYNES, ET AL. *v.* BROOKS AND ANOTHER.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, AUGUST, 1885.

§ 1871.

Judgment creditor's action.—Surviving partner.—Assignment by, for benefit of creditors.—Application of individual assets to pay firm debts.

The objection that a general assignment for the benefit of creditors is void because made by a surviving partner, is one which cannot be raised by an individual creditor of the assignor.[1,2]

Nelson *v.* Tenny (36 *Hun*, 327), distinguished.[3]

Where one of two partners continued the partnership business after the death of his copartner in the firm name, and subsequently made an assignment for the benefit of creditors, and in his schedules classed all creditors who became such in the course of the business, either before or after his copartner's death, as firm creditors, and called all the assets of the business copartnership assets, —*Held*, that the surviving partner should have closed and settled the copartnership affairs, and applied its assets to the payment of the firm's obligations, paying the residue, if any, to the persons entitled thereto;[3] that while he could not legally use the firm assets, or convert them in another form through new transactions, having done so the personal representatives of the deceased partner have an election to accept or reject such subsequent transactions, and to take the fruits or repudiate the losses,[4] and the assets and property acquired by the surviving partner after the death of his copartner could not be held to be absolutely his individual property;[4] that one classed as a firm creditor, who claimed to be an individual creditor, could not object to the disposition made of such assets.[5]

In such a case, one who loaned money to the surviving partner to pay a firm obligation, is entitled, in equity, to be repaid out of the firm assets.[7]

An individual creditor of a member of a copartnership cannot object to an assignment for the benefit of creditors on the ground that it makes provision for the payment of the assignor's individual debts out of the partnership assets.[6]

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Real estate purchased with partnership funds is in equity regarded as partnership property, notwithstanding it is legally held by the partners in common.[9]

A provision in an assignment for the benefit of creditors for the payment of partnership debts out of the individual property of the assignor is no fraud upon individual creditors,[10] and does not avoid the assignment.[9]

(*Decided August*, 1885.)

Judgment creditor's action to set aside a general assignment as fraudulent and void.

The opinion states the facts.

Edward F. O'Dwyer, and *George W. Van Slyck*, for plaintiffs.

Paddock & Cannon, for defendants.

VAN VORST, J.—This is a judgment creditor's action, in which it is sought to impeach as fraudulent and void as to creditors a voluntary assignment, made and executed by defendant Brooks, bearing date March 3, 1884. The defendant Brown is the assignee named in the instrument, and he has accepted the trust. An inventory and schedule of the assigned estate, with a list of the creditors, was filed in the office of the clerk of the court of common pleas on March 22, 1884.

The case shows that the defendant Brooks was at one time a copartner in the provision business with one Edward C. Brooks, his brother. Edward C. Brooks died in the year 1883, leaving the defendant John I. Brooks surviving. At the time of the death of Edward C. Brooks, the firm was largely indebted, and it possessed copartnership assets of considerable value. After the death of his partner, the defendant Brooks, as survivor, continued the business at the same place as that occupied by the firm, using therein the assets

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of the late firm. He transacted the same business as that in which the firm had been engaged, and under the firm name, as though no dissolution by death had occurred. He continued buying merchandise on credit and selling the same until his failure and assignment.

The indebtedness in favor of the plaintiffs, and upon which their judgment was recovered, was contracted after the death of Edward C. Brooks. It was for merchandise sold by the plaintiffs to the defendant Brooks. The plaintiffs had dealt with the late firm for several years, and dealt with the defendant Brooks, after the dissolution, the same as before. They knew of the death of Edward C. Brooks at the time of its occurrence.

The assignment is executed by John I. Brooks individually and as "surviving partner." The signature "John I. Brooks & Co.," the style of the late firm, is also affixed to the instrument. The assignment conveys all the property and effects belonging to the assignor individually and as the surviving partner, or in which he individually or as surviving partner, or the late firm, had any interest. The assignment directs the assignee to pay out of the proceeds of the assigned estate certain specified debts owing by the defendant Brooks, as survivor, or owing by the "late firm," as the same are particularly described in a schedule annexed to the assignment. Out of the residue of the assigned estate the assignee is directed to pay all the other debts existing against the firm of John I. Brooks & Co., or the defendant Brooks as the survivor thereof. In schedule A, annexed to the assignment, is found a list of the preferred creditors. The debts therein enumerated include those owing by the late firm, some being in the form of notes of the late firm, or, after the death of Edward C. Brooks, renewed by the defendant survivor, and some being

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obligations created after the death in liquidating claims of that firm.

By the inventory filed in the court of common pleas the property assigned, and which is particularly described, is called the estate of John I. Brooks & Co. It consists of merchandise, book debts, and real estate. The only distinct individual property of the assignor was a produce exchange certificate, which, according to a statement contained in the schedule, was pledged to secure a debt of the firm. The creditors are all classified under the general head of firm creditors, except one, who is named as the individual creditor of John I. Brooks. But no provision appears to have been made for the payment of that particular debt.

[1] The learned counsel for the plaintiffs urge that the assignment is fradulent and void, because it is a conveyance made by a surviving partner in trust for creditors. In support of their contention they refer, amongst other cases, to Nelson *v.* Tenny, in this court, where a general assignment, made by a surviving partner, was adjudged to be void. The case is not reported, but the opinion of the general term is submitted with the papers.* But that action was brought by the legal personal representatives of the deceased partner. The court declined to express any opinion as to whether or not the assignment was void as to the creditors of the copartnership. But be that as it may with respect to copartnership creditors, the plaintiffs, by their own election and showing, are not in the category of copartnership creditors. By their complaint they called themselves creditors of John I. Brooks individually. Their judgment is against him, and it is against him individually that their legal remedy by judgment and execution has been exhausted. They are in pursuit of

* This case has been reported, since this opinion was filed, in 36 *Hun*, 327.

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the equitable assets belonging to him, or in which he has an interest.

[*] In that aspect of the case, I cannot conclude that plaintiffs are in an attidude to interpose the objection above mentioned. That is a point which can be urged only by partnership creditors who, with the personal representatives of the deceased partner, are wronged by the act of the surviving partner.

Another objection taken by the plaintiffs is that the assignment contains no provision for the payment of the plaintiffs' demands, and that the residue of the assigned estate, after payment of the debts provided for, is not disposed of, and that presumptively it belongs to the assignor himself.

In a very material part of that statement I apprehend the plaintiffs are in error. The assignment itself is an accomplished fact. Although the plaintiffs have classed themselves as creditors of the assignor individually, which in law they doubtless are, yet the assignor has placed them, according to his view of the transaction and of their rights under the circumstances, among the firm creditors in his schedules, thus entitling them to share in the assigned estate with them. All the creditors of the late firm, as well as those whose claims arose afterwards while he was carrying on the business as survivor in the firm name, are provided for out of the copartnership assets; these so-called firm assets embracing not only what was left "in specie" of the copartnership property, but also that which remained of the merchandise and other assets into which any part of it had been changed by the surviving partner in his subsequent dealings. They were a mingled mass, and an accounting only could determine the effect of such mingling upon the different creditors. The plaintiffs' claim, is not therefore, under the assignment schedules overlooked. It is thus seen that the construction placed

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by the defendant Brooks and the plaintiffs upon the subsequent dealings of the former and his use of the firm assets, is radically different. It was clearly the duty of the defendant Brooks to have closed up [*] and settled the copartnership affairs, and to have applied its assets to the payment of the firm obligations, and if there was a residue to have paid over the same to the persons entitled thereto, and he could not legally, without the consent of all parties in interest, use the firm's assets or convert them in another form through new transactions. No objection, however, appears to have been made by the plaintiffs, who dealt with him, or by any other creditor of the late firm. There is no evidence as to whether or not the personal representatives of the deceased partner knew of the defendant's action or of his use of the firm assets, or whether they acquiesced in or dissented from it. [*] Unless I should decide that all the assets and property required by the defendant Brooks after the death of his copartner were absolutely his individual property, the plaintiffs' position, as placed by the defendant in the assignment and schedules, is better than what it would be if he is limited in his redress to the individual property and equitable assets of the defendant Brooks. This individual property, under the evidence, is trifling in value. But so to decide would be a wrong not only to the copartnership creditors but to the legal personal representatives of the deceased partner, who, not being parties to this action, have no opportunity to be heard. These personal representatives would have a right, should [*] they so elect, to insist that the dealings of the defendant Brooks, after the death of his partner, especially if carried on without their knowledge or assent, and the accumulation of assets through the use of the good will and assets of the firm by him, should inure to the benefit of the copartnership estate, and

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be in equity regarded copartnership property. At least they would have an election to accept or reject such subsequent transactions and to take the fruits or repudiate the losses. I cannot say, therefore, that the objection of the plaintiffs is absolutely well founded, as their claim is provided for, although not in the way they would have chosen.

In the disposition made by the assignor of the plaintiffs' demand, and of others of the same character, I fail to discover any evidence of actual or constructive fraud. The position was peculiar, but the results reached, under the facts and circumstances, do not appear to be inequitable; and although the plaintiffs call themselves individual creditors, and seek strict redress as such, their claim, with others similarly situated, has been provided for in a way which I cannot pronounce unjust, but otherwise—approximately, at least, equitable. Cases of this nature are to be dealt with in a way to inflict the least injury upon all concerned.

[•] Another objection interposed by the plaintiff is that the assignment makes provision for the payment of the individual debts of the defendant Brooks out of partnership assets, and that under the case of Wilson *v.* Robertson (21 *N. Y.* 587) the deed is void. But that was an action prosecuted by copartnership creditors who claimed to have been defrauded by the deed. It is quite clear that copartnership creditors prosecuting and seeking redress as such, and those only, can raise this objection. The plaintiffs, as I have already stated, do not sue as such. But the fact is that the only persons recognized by the assignment and the schedules as individual creditors, and the only ones unqualifiedly shown to be such, are Tabor and Wilson, and they are excluded, by the terms of the assignment, from participating in the proceeds.

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[*] It is, however, claimed by the plaintiffs that Brown & Co., who are preferred, are creditors of the assignor individually. They are, however, called by the assignor, and are treated as, copartnership creditors. The debt of these creditors originated in a loan of money made by them to the surviving partner to pay an accommodation note loaned to the firm itself. If a firm obligation was retired by the use of the money loaned or advanced by Brown & Co., the surviving partner would have been entitled to be repaid out of the firm property. As the moneys of Brown & Co. in fact paid a firm obligation, I see no objection to the subrogation of them in equity to the rights of the surviving partner or to the regarding of them as entitled to be repaid out of the firm assets. That works injustice to no one. That Tabor and Wilson, individual creditors, are not provided for, raises an objection, peculiar to them, of which other creditors cannot take advantage.

It is also substantially objected that by this assignment individual property has been conveyed to pay partnership debts. Unless the real estate was held in common, it was not the individual property of the surviving partner, nor was any part of it.

[*] The assignor has testified that the partners bought some real estate on Thirty-fifth street. The deed is in evidence. The premises were conveyed to John I. Brooks and Edward C. Brooks. Unexplained, the grantees would hold as tenants in common. But in equity, if purchased with copartnership funds, the premises would be regarded as copartnership assets. As the partners bought it and occupied it, as they did, for their business, it was presumptively paid for with copartnership moneys. It is inventoried in the schedule as copartnership assets.

[*] But conceding for the moment that the partners held the premises as tenants in common, and

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that the assignor's individual property was appropriated to pay copartnership debt, would that make the assignment fraudulent as to individual creditors? I think not. This is an entirely different question from that which arises from the devotion of copartnership property to the payment of the individual debts of the assignor. A partnership debt is as much the obligation of the several partners as an individual indebtedness.

["] It has been expressly adjudged that a provision in an assignment for the payment of copartnership debts out of the individual property of one of the partners is no fraud upon the individual creditors (Kirby *v.* Schoonmaker, 3 *Barb. Ch.* 46; Van Rossum *v.* Walker, 11 *Barb.* 237; O'Neil *v.* Salmon, 25 *How. Pr.* 246).

I cannot, therefore, find that for any reason assigned by the learned counsel for the plaintiffs, the assignment is fraudulent as to creditors, in law or in fact. I cannot find that the disposition made by the assignor violates any principle of equity, except in that it creates preferences. Equity prefers equality among creditors. But preferential assignments have been and continue to be tolerated in both courts of law and equity. This is a judgment creditor's action, and not one to marshal assets. The plaintiffs seek priority in payment, through the lien created by their action upon the equitable assets of their judgment debtor. They have not established any such right, as the assignment is not found to be impeachable for fraud upon creditors.

The plaintiff's complaint must be dismissed, with costs.

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LERCHE, APPELLANT, *v.* BRASHER, AS ADMINISTRATOR *cum testamento annexo*, ETC., OF VAN WYCK, DECEASED, RESPONDENT.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM, SEPTEMBER, 1885.

§§ 501, 829.

Party testifying against administrator.—To what he cannot testify.—Counter-claim—Instance of, properly set up.

In an action by an attorney against an administrator for services rendered the decedent, it is error to allow the plaintiff, after proof of a general employment, to testify to the services which he had performed and the value thereof; every item of an account so made up is a regular transaction with the deceased, of which the plaintiff is prohibited from giving evidence by section 829 of the Code of Civil Procedure.[1,2]

A party examined in his own behalf as a witness against an administrator, etc., should not be permitted to testify that the claim sued on has not been paid.[3]

Where in an action by an attorney against an administrator for professional services, the answer set up as a counter-claim a demand for damages resulting from the alleged fraudulent transfer by the plaintiff of certain bonds and mortgages belonging to the defendant's decedent, of which the plaintiff became possessed after such decedent's death,—*Held*, that such claim was properly pleaded as a counter-claim in the action;[4] that it grew out of the employment set out in the complaint.[4]

(*Decided September* 22, 1885.)

Appeal from an order of Mr. Justice BARTLETT granting a motion for a new trial made on the minutes.

The action was brought to recover $2,675.45 for professional services rendered the defendant's decedent, Pierre M. Van Wyck, intermediate December

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1, 1879, and May 20, 1880. The said Van Wyck died May 25, 1880.

The answer denied that plaintiff rendered the services in question, and alleged as a defense and counterclaim herein, that Van Wyck was the owner of certain bonds and mortgages worth $9,600, and plaintiff became possessed of same, and, for the purpose of defrauding said estate, transferred said bonds and mortgages to one Francis Xavier Huber; that an action was commenced against said Huber in the supreme court to recover said bonds and mortgages; alleged judgment in said action against said Huber, and the recovery of said bonds, and mortgages, and that in recovering same defendant necessarily expended $2,000.

The cause was tried before Mr. Justice BARTLETT and a jury at the Kings county circuit court on November 20, 1884, and resulted in a verdict in favor of the plaintiff for $750. Thereafter a motion for a new trial was duly made on the minutes and granted.

The opinion states other facts.

G. A. Clement, for plaintiff-appellant.

Morris & Pearsall, for defendant-respondent.

The court erred in allowing plaintiff to testify, against defendant's objection, to the question: Has any part of this been paid? Answer. No. It is well settled that a negative fact cannot be proved by a witness who is a party and brought within section 829. Dyer *v.* Dyer, 48 *Barb.* 190; Howell *v.* Van Siclen, 6 *Hun*, 115; Haughey *v.* Wright, 12 *Id.* 179. The question "Has any part of this claim been paid" should have been excluded. Wilson *v.* Reynolds, 31 *Hun*, 46; Howell *v.* Van Siclen, 6 *Id.* 115; Somerville *v.* Crook, 9 *Id.* 664; Baldwin *v.* Smith, 5 *Id.* 454; Hill *v.*

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Heermans, 17 *Id.* 470; Haughey *v.* Wright, 12 *Id.* 179; Tooley *v.* Bacon, 70 *N. Y.* 34; Chadwick *v.* Fonner, 69 *Id.* 407; Brague *v.* Lord, 2 *Abb. N. C.* 14; Pease *v.* Barnett, 30 *Hun*, 525; Hadsall *v.* Scott, 26 *Id.* 617. . . .

The court erred in permitting plaintiff to testify to the various services rendered by him for deceased. Fisher *v.* Yerplank, 17 *Hun*, 150. . . .

It was error to permit the plaintiff to testify to the value of the services in question. Somerville *v.* Crook, 9 *Hun*, 664.

The court erred in excluding proof of the defense or counter-claim of $2,000, set forth in defendant's answer. . . . The answer is based on the transactions for which plaintiff is suing. The proof is, that under a power of attorney from deceased, plaintiff acted as agent and attorney for deceased, up to his death, and the answer alleges that at the same time, and whilst acting as said attorney, he negligently and improperly performed his duties, and assigned two bonds and mortgages belonging to the deceased. Wadley *v.* Davis, 63 *Barb.* 500. Where securities in the hands of a creditor are wrongfully disposed of by him, so that the debtor has a claim upon him for damages for their loss, such damages can be set off against the debt *pro tanto*, in an action at law brought by the creditor for the recovery of debt. Bulkeley *v.* Welch, 31 *Conn.* 339; Ainsworth *v.* Bowen, 9 *Wis.* 348; and see Campbell *v.* Fox, 11 *Iowa*, 318. In an action for fees by an attorney against his client, the latter may show, under the general issue, that the attorney conducted the business so negligently, that his services were of no benefit to his client, and thus defeat the whole claim. Gleason *v.* Clark, 9 *Cow.* 57. See Harlock *v.* Le Baron, 1 *N. Y. Civ. Pro.* 168; Allaire Works *v.* Guion, 10 *Barb.* 55. Defendant may give in evidence, by way of set-off, act of non-feasance or mis-feasance

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by the plaintiff where the acts are immediately connected with the plaintiff's cause of action, for the purpose of defeating, in whole or in part, the plaintiff's cause of action. 7 *Wait's Actions and Defenses*, 485; Herrion *v.* Norton, 2 *Ashm.* (*Penn.*) 150; Streeter *v.* Streeter, 43 *Ill.* 155; Waterman *v.* Clark, 76 *Id.* 428. In an action by an agent against his principal, to recover compensation for services, the latter may set off any damages he may have incurred in consequence of any action of the agent in reference to the subject matter of his agency after his authority ceased. McEwen *v.* Kerfoot, 37 *Ill.* 530. In an action to recover for services rendered defendant is entitled to show, by way of recoupment of damages, loss sustained by him through the negligence of the employee. . . . Still *v.* Hall, 20 *Wend.* 51.

BARNARD, P. J.—The new trial was properly granted. The claim was for services rendered Pierre M. Van Wyck, deceased, by the plaintiff, as his attorney and agent. The denial is complete upon the part of the administrator. Upon the trial, the plaintiff presented himself as a witness in his own behalf. There was given in evidence a certified copy of a power of attorney from the deceased to the plaintiff, taken from the records of the city and county of New York. There was other proof given tending to show an employment of the plaintiff made by the deceased in his lifetime. The plaintiff, under objection, was permitted to testify to the services done under this employment, and to the value of such services. The court charged the jury in respect to section 829 of the Code,—which forbids the reception of evidence of a party to a transaction when the opposite party to it is dead,—as follows: "Now the statute to which I have referred does not in my opinion prohibit a man, after his employment has been shown by other evidence,

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from testifying to the services which he has performed."

['] We think that section 829 of the Code of Civil Procedure does not permit this evidence. Assuming a general employment as of attorney and client it is not permitted that an attorney shall build up the claim by his own evidence of what was done by him under the employment.

['] Every item of an account so made up is a regular transaction with the deceased, because it needs an employment and services to make the claim. The section in question gives no real protection to estates of deceased persons if so read. The party benefited makes the claim and establishes its value by his own oath (Fisher *v.* Verplank 17 *Hun*, 150).

['] It was also erroneous to permit the question to be answered by plaintiff that the claim had not been paid (Howell *v.* Van Sicklen, 6 *Hun*, 115; affi'd, 70 *N. Y.* 595).*

The question of the counter-claim is not free from doubt. The answer charges that the plaintiff became possessed of certain personal property of the deceased after his death, and, to defraud the estate, transferred the same, thereby causing great damage to the estate. If this had been done in the lifetime of deceased, it would be the right of the administrator to seek redress by way of counter-claim. The injury was done after death, but it must be either wholly remediless or the executor or administrator must sue for redress. If the cause of action belong to the administrator or executor in his representative capacity, he must sue in that capacity (*Code of Civil Procedure*, § 1814.) If he can sue as administrator he can set up a counter-claim in an action brought against him in his representative

* See to same effect Boughton *v.* Bogardus, 7 *N. Y. Civ. Pro.* 252; Williams *v.* Davis, 7 *Id.* 282.

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capacity unless he is prevented by the principle that a tort cannot be set off against a contract. Even that can be done where the cause of action for tort grew out of some transaction or is so connected with the subject of the plaintiff's action (*Code of Civil Procedure*, § 501.)

[1] This depends whether the cause of action on the plaintiff's part ended with the life of the deceased within the meaning of this section. It seems to me it does not. Assuming that the plaintiff under an employment by deceased obtained possession of the property, and by virtue of a power of attorney from deceased executed an assignment dated back to a time when the deceased was living, this was a transaction growing out of the employment although done after the death of the client.

The order granting a new trial should be affirmed, with costs.

DYKMAN J., concurred.

IN RE RECEIVERSHIP OF THE UNITED STATES REFLECTOR COMPANY.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, SEPTEMBER, 1885.

§§ 8, 14.

Contempt—what interference with property of corporation after appointment of receiver is.

Where one C., having a bill of sale of certain personal property from a corporation, took possession thereof after a receiver of such corporation had been appointed,—*Held*, that he was not guilty of con-

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tempt merely because the receiver who had not taken possession of the property, claimed it, or because creditors of the corporation asserted that the receiver should have taken possession of it.

It seems, that the court will punish as a contempt any efforts to prevent a receiver from receiving property which he is entitled to take as such receiver, even though it may not have actually come into his possession, and will also punish as a contempt any interference with his possession of property of which he has taken possession, even by one having a valid paramount title, without first obtaining leave of court.

(*Decided September*, 1885.)

Motion to punish one William P. Corbit as for a contempt.

The opinion states the facts.

William B. Hornblower, for the motion.

E. P. Wilder, opposed.

VAN BRUNT, J. —The facts pertinent to the decision of this motion are exceedingly few and simple.

The United States Reflector Company was a corporation duly organized under the laws of the State of Connecticut, but doing business within the city of New York The company having become involved in certain controversies with the petitioners, Hall, Nicol and Granberry, two actions were commenced by said petitioners against said company, and attachments were issued to the sheriff of the city and county of New York, who by virtue thereof seized and took possession of all the property of the defendant within this city, which property was valued at a large sum of money. Subsequently other creditors commenced suits and procured judgments against the company. In October, 1882, the company, while its property was still in the possession of the sheriff and held under the attachments issued at the suit of Hall, Nicol and

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Granberry, assigned all this property to one William P. Corbit in payment of an alleged debt due from the company to said Corbit.

In May, 1883, the attachments of Hall, Nicol and Granberry were vacated, but the sheriff continued to hold the property, claiming a lien thereon for his fees and charges, until about August, 1885, when he abandoned the possession of it.

In June, 1883, Mr. Edward P. Wilder obtained a judgment against the company for alleged professional services rendered by him to the company and expenses incurred in its behalf.

An execution having been issued by the judgment and returned unsatisfied, Mr. Wilder commenced an action to sequestrate the property of the company, and in January, 1884, in this action, Mr. Francis H. Wilson was appointed receiver of the property of the company. Upon the abandonment of the property by the sheriff the said Corbit proceeded to take possession of the property, claiming title thereto under his bill of sale. The present motion was thereupon made upon the petition of Hall, Nicol and Granberry, claiming to be creditors of the company, and the Messrs. Cassidy and Mc Lewee, judgment creditors of the company, to punish the said Corbit and certain other persons claimed to be aiding and abetting him, for contempt, because of the attempt of said Corbit to take possession of the property assigned to him by the company, and to compel him to deliver over said property to the receiver of said company upon the ground that the assignment of said property to him by said company was fraudulent and void.

It is undoubtedly true that the court will punish as a contempt any efforts to prevent a receiver from receiving property which he is entitled to take as such receiver, even though it may not have actually come into his possession. It is also equally true, as stated

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in Kerr on Receivers (*Bispham's*, 2 edition, page 177), viz.: "Where the court has taken possession of property by its receiver, if anyone, whoever he may be, disturb the possession of the receiver, it holds that person as guilty of a contempt of court, and liable to be imprisoned for that contempt. The court will not allow the possession of its receiver to be interfered with or disturbed by anyone, whether claiming paramount to or under the right which the receiver was appointed to protect. A man who thinks he has a right paramount to that of the receiver, must, before he presumes to take any steps of his own motion, apply to the court for leave to assert his rights against the receiver." And again, at page 179: "The court requires and insists that applications should be made to it for permission to take possession of any property of which the receiver has taken or is directed to take possession. The rule is not confined to property actually in the hands of a receiver. The court will not permit anyone, without its sanction and authority, to intercept or prevent payment to the receiver of any property which he has been appointed to receive, though it may not be actually in his hands." High on Receivers (section 166) lays down the following rule: "It is also a well established principle that to render a defendant or other person liable by attachment for contempt in disturbing or interfering with property of which a receiver is entitled to possession, it is not necessary that he should be officially apprised of the receiver's appointment."

But none of the acts referred to in the above citations have been done by Mr. Corbit. He has not interfered with the possession of the receiver, as the receiver not only never has had possession of this property, neither is there any evidence that he claims possession. Mr. Corbit has not interfered with any property of which the receiver has been directed

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to take possession, as there is nothing in the order appointing the receiver which directs him to take possession of this property. He is directed to take possession of the property of the company, and this property no longer belongs to the company if the bill of sale to Corbit is valid, and the receiver has never made any claim impeaching it. If the receiver had taken possession of this property, claiming title to the same as such, anybody would be guilty of contempt if he interfered with the possession of the receiver, even though he had a valid paramount title, without first having obtained leave of the court; but it is not true that merely because a receiver claims property, the possession of which he has never attempted to take, the true owner cannot take the same into his custody. This would be giving a mere claim upon the part of a receiver as much force as a judicial determination. But in the case at the bar the receiver makes not even a claim, but some persons claiming to be creditors propose to interfere and prevent an ostensible owner from taking possession of his property, because they say the receiver should take possession of it, but which he has not attempted or claimed the right to do.

But it is claimed that the ostensible owner has no title because the transfer to him is fraudulent and void.

I am unaware that conveyances can be set aside upon motions of this kind. The parties are entitled to a trial upon issues properly framed, having the party claiming title before the court, asserting his rights, so that the witnesses may be examined in the manner prescribed by law and an authoritative adjudication arrived at.

The motion must therefore be denied, with costs.

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MEIGGS ET AL. *v.* WILLIS ET AL.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM, APRIL, 1885.

§§ 1323, 1675.

Foreclosure—Writ of assistance—Against whom issued.

The power of the court to give possession to the purchaser at a foreclosure sale by a writ of assistance only extends to those persons who are parties to the foreclosure suit or who have come into possession under or with the assent of those who are parties, subsequent to the commencement of the suit.

When a writ of assistance is improperly granted the court upon motion is bound to correct the wrong.

Where the complaint in an action for the foreclosure of a mortgage was dismissed as to a defendant because he claimed title prior and paramount to the plaintiff and his mortgagor,—*Held*, that he could not be put out of possession by a writ of assistance issued in the action.

(*Decided April* 9, 1885.)

Motion to set aside a writ of assistance granted under section 1675 of the Code of Civil Procedure, and restore the party ejected thereunder to possession.

The action was brought to foreclose a mortgage, and one Thompson, who was in possession at the time the action was commenced and also when the judgment was entered, was put out of possession under an order directing the sheriff to put the purchaser at the foreclosure sale in possession, whereupon he made this motion.

Other facts are stated in the opinion.

TRUAX, J.—Thompson was a party defendant in the foreclosure action, and answered, setting up his

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his title, and upon the trial put in proofs in support of it. The complaint was dismissed as against him; and the court must have determined, in dismissing the complaint as to Thompson, that his estate, if he had any, was acquired prior to the execution of the bond and mortgage by Willis.* Thompson ceased to be a party to the action before the entry of the decree of foreclosure and sale, and was not affected by it. Thompson was the person who was put out of possession by the writ of assistance. The Duffys positively deny under oath that they have any claim to the title or possession. The court can enforce the decree only against the parties to the suit, and has no power by statute or otherwise to deprive any person of possession who is not a party to the suit or who has not acquired such possession from a person who was bound by the decree (Frelinghuysen *v.* Colden, 4 *Paige*, 204; Van Hook *v.* Throckmorton, 8 *Id.* 33; Boynton *v.* Jackway, 10 *Id.* 307).

The power of the court to give possession to the purchaser at a foreclosure sale, by a writ of assistance, only extends to those persons who are parties to the foreclosure suit or who have come into possession under or with the assent of those who are parties subsequent to the commencement of the suit (Boynton *v.* Jackway, 10 *Paige*, 307). As Thompson was not a party to the action when the judgment was entered, and was not bound by the judgment, it is clear that the writ of assistance should be modified, and that he should be restored to possession.

When a writ of assistance is improperly granted, the court, upon motion, is bound to correct the wrong (Chamberlain *v.* Choles, 35 *N. Y.* 477). Motion granted, with costs.

* See for opinion of court on making this decision, Meigs *v.* Willis, 5 *N. Y. Civ. Pro.* 106.

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McKENNA, AS TEMPORARY ADMINISTRATRIX OF O'NEIL, DECEASED, RESPONDENT, *v.* BOLGER, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENRAL TERM, OCTOBER, 1885.

§ 829.

Evidence—Rule as to party's testifying concerning personal communications with opponent's decedent.—Agreement not within statute of frauds.

An agreement by a mortgagee to pay a certain sum to the owner of the mortgaged real estate upon receiving title thereto through amicable proceedings to foreclose the mortgage, which has been partly consummated by the actual sale under foreclosure, and the conveyance to the mortgagee of the whole title, is a valid agreement upon which an action can be maintained for the price agreed upon as for lands sold and conveyed at the purchaser's request, notwithstanding the agreement was not in writing.[1]

In an action brought by the personal representative of a deceased person to recover from a mortgagee who had purchased the mortgaged property under foreclosure, a sum of money which he was alleged to have agreed to pay the plaintiff's decedent for being permitted to foreclose and take title in that manner, where the defendant denied the existence of any such agreement, and asserted that the foreclosure was made because of the plaintiff's decedent's failure to pay interest on the mortgages, the defendant, examined on the trial as a witness in his own behalf, may properly be interrogated as to what induced him "to have the property foreclosed," and as to "the situation of the property at the time before the foreclosure suit as to the payment of interest;" these were extrinsic facts not objectionable on the ground that they were "personal communications with the deceased."[2,4]

Pinney v. Orth (2 *N. Y. Civ. Pro.* 1), followed.[3]

Where in an action brought by the administrator of one "O'N." against one "B.", one "T." who had acted for "O'N." in carrying out the alleged agreement sued on, had given testimony tending to show that he had conversations with the appellant on the subject of the alleged agreement,—*Held*, that the defendant was not precluded from contradicting that testimony, or from showing affirmatively how often he had been at "O'N.'s" office, or whether or not

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there had been any agreement made between himself and "T." in the absence of "O'N." [5,6]

It was not the intention of section 829 of the Code of Civil Procedure,—which provides that a party shall not be examined in his own behalf against an executor, etc., of a deceased person concerning a personal communication or transaction with the deceased,—to prevent a party from testifying to any extrinsic fact that tends to contradict a witness who swears to a transaction or communication had between such party and a deceased person, even where he cannot directly testify that no such conversation or transaction was ever had.[7]

Where in an action in which the personal representative of a deceased person was plaintiff, a complaint was offered in evidence by the defendant, after the attorney who drew it had testified that the statements contained in it were made to him by the plaintiff's decedent, who, though a defendant therein, instigated the suit,—*Held*, that the complaint was competent evidence as a declaration of the said decedent, if relevant to the issues.[8]

(*Decided October* 9, 1885).

Appeal from a judgment of the supreme court, circuit, entered upon verdict of a jury.

The facts fully appear in the opinion.

John McCrone and *John T. Fealon*, for plaintiff.

M. J. McKenna, for respondent.

DAVIS, P. J.—This action was brought to recover a sum alleged to have been agreed to be paid by the appellant to the decedent John P. O'Neill for his interest in a certain farm held and owned by the appellant and O'Neill as tenants in common. The substance of the alleged agreement is that on receiving title to the whole of the farm through amicable proceedings to foreclose a mortgage then existing upon it, the appellant should pay O'Neill $1,666, being one-half of the sum originally invested by O'Neill in the purchase of the farm. A foreclosure was had, it is claimed, under this agreement, at which the appellant purchased the farm and took title to the whole thereof, giving his individual bond and mortgage in lieu of

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those previously existing, but afterwards refused to pay the price stipulated for O'Neill's interest.

[] We see no reason why such an agreement, when consummated by the actual sale and conveyance of the whole title, is not a valid one upon which an action can be maintained for the price agreed upon as for lands sold and conveyed at a purchaser's request at a stipulated price. An agreement of purchase and sale, reduced to writing, &c., is not at all necessary when an action is brought to recover an agreed price for lands actually sold and conveyed, pursuant to an oral agreement, where the consideration remains unpaid. And that in substance was the alleged agreement in this case, except that the purchaser was to take the title through an amicable foreclosure to be procured and consummated by the seller. We have already determined this question on the demurrer to the answer brought before us by appeal from the special term.*

But questions as to the admissibility of evidence arose upon the trial of this case that call for consideration. This action was brought by O'Neill in his lifetime. On his decease, the present plaintiff was substituted as his temporary administratrix. The chief testimony in the case to support the alleged agreement was given by one Tobias, a lawyer, who was to some extent connected with O'Neill in business and acted on his behalf in carrying out the agreement. He gave testimony tending to establish the agreement by conversations had in his office and in his presence between O'Neill and the appellant. The agreement was denied by the appellant in his answer, and for the purpose of

* The opinion here referred was digested *sub nom.* McKenna v. Bolger, 17 *N. Y. Weekly Dig.* 431; but has not been reported in full. An appeal to the court of appeals from an order of the general term denying a motion to dismiss the appeal from the judgment sustaining the demurrer was dismissed, 64 *N. Y.* 641.

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contradicting or impairing the testimony of Tobias, the defendant sought to give testimony himself, showing a condition of things inconsistent with the alleged making of such an agreement. With this view, amongst other things he was asked the following question:

[1] "Will you state to the jury what induced you to have the property foreclosed?" This question was objected to, on the ground "that it is a personal communication with the deceased." The objection was sustained, and an exception taken. The appellant was then asked, "State the situation of the property at the time before the foreclosure suit, as to the payment of interest and all that?"

The same objection and ruling was made, and the same exception taken.

[1] The appellant claimed that the forclosure was not made because of any such agreement as the plaintiff alleged, but because of O'Neill's neglect to pay interest on the mortgages and to keep up his part of the expenses of carrying the property. These were extrinsic facts clearly competent to be proved as tending to maintain the defendant's theory of the case. We see no reason why they could not be proved by his testimony. They were not of necessity personal transactions or communications had between the defendant and the deceased, and if they turned out to be in whole or in any part of that character they could have been to such extent excluded when the fact appeared.

[1] In Pinney *v.* Orth (2 *N. Y. Civ. Pro.* 1), it was held that "a party is not precluded from testifying to extraneous facts which tend to show that one who has testified to such a transaction has testified falsely, or that it is improbable that his statement can be true." See also Lewis *v.* Merritt (98 *N. Y.* 306).

[1] The facts and circumstances which the questions excluded were designed to call out, may

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perhaps have been such as to satisfy the jury that Tobias had not testified truly as to the making of the alleged agreement, and they were not necessarily within the inhibition of section 829 of the Code, and therefore the testimony should have been received, and so far as it appeared to be outside of the inhibition of that section, submitted to the consideration of the jury.

[*] The following questions were also asked the appellant and excluded under the same objection and exception.

"State whether or not you ever made any agreement with Mr. Tobias, acting for Mr. O'Neill, O'Neill being absent, in relation to the purchase of O'Neill's interest in such farm?"

"How many times were you in O'Neill's office in relation to this transaction?"

The ruling as to these questions was erroneous. Tobias had given testimony tending to show that he had conversation with appellant on the subject of the alleged agreement when O'Neill was not present, and in relation to the payment of the amount sued for.

[*] The defendant was not precluded from contradicting that testimony, or from showing affirmatively how often he had been at O'Neill's office, and whether or not there had been any agreement made between himself and Tobias in the absence of O'Neill.

In Pinney *v.* Orth (*ubi sup.*) the court said: "We think that Mr. Orth, the defendant, was competent to testify that he was not in the city of New York at the time referred to by the witness, or that the witness was at some other place, or that he never met the witness at the office when the conversations are alleged to have occurred."

[*] It is not the intention of the Code to prevent a party to a suit from testifying to any extrinsic fact that tends to contradict a witness who swears to transactions or communications, had between such party

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and a deceased person, even where he cannot directly testify that no such conversation or transaction was ever had. It was not the intention to prevent the contradiction of a living witness, but to prevent a living party to a transaction or communication from testifying to it himself, where death has closed the mouth of the other party. So, when a living witness swears to a contract made by a defendant with a deceased party at a specified time or place, there is in our judgment nothing in the Code to prevent the defendant from testifying that at the time named he was in Europe or at some distant place, rendering it impossible that the witness speaks the truth.

Subsequently to the foreclosure and purchase by the defendant of the farm, it was shown that one McCandless commenced a suit against the defendant and O'Neill, alleging that he was, in equity the owner of one-third of the farm, and that the proceedings in the foreclosure suit and in the sale to the defendant were fraudulently had and taken to deprive him of his interest in the property. This suit was an amicable one as between McCandless and O'Neill, it being arranged that no judgment should be taken against O'Neill, but he should be made a formal party, because the title of the farm had been, prior to the foreclosure, in him and the defendant. It was testified that O'Neill furnished all the facts stated in the complaint to the attorney of McCandless, who verified the complaint (McCandless being a non-resident) upon the statements of O'Neill. The attorney testified in substance that the statements of the complaint were those made to him by O'Neill, who, though a defendant, instigated the suit. The complaint was then offered and rejected, and exception taken.

We think the complaint was competent as declarations of O'Neill. The declarations, it is claimed tended to contradict the allegations of O'Neill's com-

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plaint in this action, as to the reasons for having the foreclosure and sale of the farm. The complaint offered in evidence is not before us, and we cannot see how far it would have gone toward that object, but it was not excluded because it did not tend to such contradiction, and we think it was error to exclude it.

For these errors, without considering the other points presented by the appellant, we are of opinion that the judgment must be reversed and a new trial ordered, with costs to abide the event.

BRADY and DANIELS, JJ., concurred.

COOK, APPELLANT *v.* RIEF, RESPONDENT.

N. Y. SUPERIOR COURT, GENERAL TERM, MAY, 1885.

§ 535.

Slander—Pleading.

It is actionable *per se*, to say of a person "Those people up-stairs keep a whore-house." An allegation that these words were spoken "concerning" plaintiff is sufficient, and will admit proof that plaintiff was one of "those people up-stairs."

(*Decided June* 19, 1885.)

Appeal from an order dismissing the complaint, and from the judgment entered against the plaintiff, and from the order denying the motion for a new trial.

The complaint alleges "that on October 4, 1884, at or near the premises No. 77 Grand street, in the city of New York, the defendant, in the presence and

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hearing of a number of persons, maliciously spoke concerning the plaintiff, the following false and defamatory words, viz: 'Those people up-stairs keep a whore-house, and I can prove it;' meaning thereby this plaintiff, whereby plaintiff was injured in her reputation to the damage of $5,000."

The answer was a general denial.

The trial judge dismissed the complaint on the ground that it did not set forth facts sufficient to constitute a cause of action.

Henry C. Andrews, for appellant.

J. H. Whitelegge, for respondent.

TRUAX, J.—Section 535 of the Code of Civil Procedure says that it is not necessary, in an action for libel or slander, to state in the complaint any extrinsic fact for the purpose of showing the application to the plaintiff of the defamatory matter; but the plaintiff may state, generally, that it was published or spoken concerning him.

The words here are actionable *per se*. The only extrinsic fact necessary for the plaintiff to show, in order to maintain her action, is the fact that she was one of those people up-stairs. She has alleged, in the words of the Code, that they were spoken concerning her, and by demurring to the complaint, the defendant has admitted the truth of this allegation, that she was one of those people up-stairs (Wesley *v.* Bennett, 6 *Duer*, 688; S. C., 5 *Abb.* 498; Malone *v.* Stilwell, 15 *Abb. Pr.* 421; Parker *v.* Raymond, 3 *Abb. N. S.* 343).

This case is to be distinguished from the case of Fleischmann *v.* Bennet (87 *N. Y.* 231). In that case the libelous article assailed the firm of Gaff, Fleischmann & Co., but the plaintiff alleged, and on the demurrer it was taken as true, that he was not, and

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never had been member of that firm, and therefore, the court held that the words used had no application to the plaintiff. It is as though the plaintiff in this case, had alleged that she was not one of "those people upstairs."

The judgment and order appealed from are reversed, and a new trial is ordered, with costs to the appellant to abide the event.

SEDGWICK, Ch. J., concurred.

FORBES, RESPONDENT, *v.* SPAULDING, APPELLANT.

N. Y. SUPERIOR COURT, GENERAL TERM, MAY, 1885.

§ 2435.

Supplementary proceedings—Sufficiency of return of execution.

More than sixty days after the issuing of an execution, the sheriff returned it with the following indorsement thereon: "In pursuance of the demand of plaintiff's attorney, I make the following return to the within execution: I have collected nothing under, and have not found any personal property out of which the said execution, or any part of the same can be made, but I have thereunder levied upon the real estate mentioned in the annexed note of sale, and have advertised the same for sale as in said notice provided. I have found no other property out of which to satisfy the same,"—*Held*, a sufficient return unsatisfied to support an order for defendant's examination in proceedings supplementary to execution.

(*Decided June* 1, 1885.)

Appeal by defendant from an order denying his motion to vacate an order for his examination in proceedings supplementary to execution.

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The ground of the motion to vacate was that the execution had not been returned unsatisfied. The execution was delivered to the sheriff on October 21, 1884, and returned by him February 5, 1885. The return was in the following words: "In pursuance of the demand of plaintiff's attorney, I make the following return to the within execution: I have collected nothing under, and have not found any personal property out of which the said execution or any part of the same can be made, but I have thereunder levied upon the real estate mentioned in the annexed notice of sale, and have advertised the same for sale as in said notice provided. I have found no other property out of which to satisfy the same." To this was attached a copy of the notice of sale.

Alex. Thain, for appellant.

John H. Kitchen, for respondent.

SEDGWICK, Ch. J.—The sole question is whether the execution was returned wholly unsatisfied or partly unsatisfied, within the meaning of section 2435 of the Code of Civil Procedure. If it were, the right of the plaintiff to the order of examination is clear. The general rules that relate to the right of a creditor to bring an action to apply equitable assets to the satisfaction of a judgment, in lieu of which, to a certain extent, supplementary proceedings were allowed, may be adverted to for the purpose of construing the statute, when construction is permitted, but not where the statute is unambiguous.

The effect of the return is not modified by its statement that the return was made at the request of the plaintiff's attorney. It was the duty of the sheriff to have made the return at a much earlier day.

It appears on the face of the return that the execu-

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tion was unsatisfied, unless the statement that there was a levy upon the real estate, and notice of sale under it, intimates that there was satisfaction. Strictly, the levy of an execution upon real estate is unknown to the law (Wood *v.* Colvin, 5 *Hill*, 228; Colt *v.* Phœnix Fire Ins. Co., 4 *N. Y.* 595).

The performance of the mandate of the process is an execution of a power to sell, under the statute (Wood *v.* Colvin, *supra*). But the proceeding to give notice of sale in execution of that power is not a satisfaction (Shepard *v.* Rowe, 14 *Wend.* 260; Taylor *v.* Ranney, 4 *Hill*, 619).

In a creditor's action the fact that the debtor had property which might have been taken by legal process, was not a defense in the action. It was not enough if the complainant had in good faith used the only power he had over the defendant's property, by issuing the legal process and awaiting its return.

In the present case, the appellant is not aided even by a presumption that the sale would result in the plaintiff's receiving any money under the judgment.

Of course, if the judge below had been satisfied that the same matter had been previously determined between the parties in favor of the defendant, he would have followed the first decision. It was not clearly shown that the same matter had been previously determined.

Order affirmed, with $10 costs and disbursements to be taxed.

FREEDMAN, J., concurred.

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WYCKOFF *v.* DEVLIN.

CITY COURT OF NEW YORK, SPECIAL TERM, SEPTEMBER, 1885.

§§ 3160, 3268.

Security for costs—Who not required to give, as non-resident in N. Y. City Court.

A non-resident of the State of New York who has an office in the City of New York, where he regularly transacts business in person, cannot be required to give security for costs in an action in the city court of New York on the ground that he is a non-resident.
The legislation on the subject reviewed.
(*Decided September* 30, 1885.)

Motion by plaintiff to set aside an order requiring him to file security for costs as a non-resident.

Sufficient facts are stated in the opinion.

W. J. McCready, for the motion.

J. M. Fiske, opposed.

HALL, J.—It is conceded, for the purpose of this motion, that the plaintiff does not reside in the State of New York, but has an office or place in the city of New York, where he regularly transacts business in person; and plaintiff claims that under the provisions of section 3268 Code of Civil Procedure, as modified and limited by section 3160, he cannot be required to give security for costs in an action in this court. Section 3268 provides that "the defendant in an action, brought in a court of record, may require security for costs to be given . . . where the plaintiff

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was, when the action was commenced, either: "1. A person residing without the State; or, if the action is brought in the marine (now city) court of New York . . . . . residing without the city or county . . wherein the court is located."

The clear meaning of this provision would seem to be, that in actions in courts of records not specially designated, security can be required only when the plaintiff is a non-resident of the State, but in the courts designated by name (including this court) security may be required where the plaintiff is a non-resident of the city or county over which such courts have jurisdiction, without regard to non-residence in the State, and except for the limitation contained in section 3160, no question could arise as to defendant's right in this action to require plaintiff to give security.

Section 3160 provides, among other things, that "a plaintiff who has an office for the regular transaction of business in person, within the city of New York, is deemed a resident of that city, within the meaning of section 3268 of this act." The language of this section is peculiar; the words, "*a plaintiff*," mean *any plaintiff*, without regard to his place of residence. There is no restriction in this regard, and the intention of the legislature seems to have been to treat persons carrying on business in New York city, without regard to their place of residence, precisely the same as residents, so far as allowing them to commence and prosecute actions in this court. And such a construction is no innovation upon the practice in this court, as it existed for several years before the Code of Civil Procedure.

Prior to 1876, the practice was entirely regulated by the Revised Statutes, title II, part 3, chapter 10,* which in general terms required security to be filed

* *R. S.* 620.

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upon demand, by any plaintiff residing outside of the jurisdiction of the court in which the action was commenced. But chapter 136 of the laws of 1876 (specially applicable to this court) section 51 provides "where a suit shall be commenced in the court, I. For a plaintiff not residing within the city and county of New York . . . . the defendant may require the plaintiff to file security for the payment of the costs, &c." But subdivision 13 of that section provides: "The provision of this section shall not apply to plaintiffs who have a place of business or of stated employment within the city of New York, who for the purpose of this section shall be deemed residents." And this exemption was without regard to whether or not the plaintiff was a resident of the State; that is provided for by subdivision 14 of the same section.

It will thus be seen, beyond a doubt, that at least from 1876 down to the time the Code took effect, a plaintiff having a regular place of business in New York, who sued in this court, was not obliged to give security, although a non-resident plaintiff suing in any other court of record was obliged to give such security.

This act of 1876, and also the provisions of the Revised Statutes, were repealed by the general repealing act (2 *Bliss Code*, pp. 1058 and 1059);* but it seems to me a perfectly reasonable conclusion that the legislative intention was substantially to re-enact the provisions of the act of 1876, in regard to actions in this court, and to extend and continue the immunity of that act to all persons doing business regularly in this city.

If, as contended by defendant's counsel, the exemption provided by section 3160 was intended to apply only to residents of this State, the codifiers have been singularly unfortunate in the the use of language; but

* Laws of 1880, chap. 245, § 1, subd. 52.

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I do not think that such was the intention, as a reference to section 3169, applicable to attachments in this court, subdivision 3, will show there was no difficulty in finding language to express the idea contended for by defendant. That subdivision provides "that the defendant, *being a resident of the State, is not a resident of the city of New York*, and has not an office within that city where he regularly transacts business in person;" but no such restriction as to residence in the State is found in section 3160.

The case of Stephenson *v.* Hanson (4 *N. Y. Civ. Pro.* 104) has no application; in that case, plaintiff was a resident of Brooklyn.

I am, therefore, clearly of opinion that a non-resident of the State of New York, who has an office in the city of New York where he regularly transacts business in person, cannot be required to give security for costs in an action in this court.

The motion to set aside the order requiring plaintiff to file security, must be granted, with $10 costs to plaintiff to abide the event.

TEBO, APPELLANT, *v.* ROBINSON, RESPONDENT.

COURT OF APPEALS, OCTOBER, 1885.

§§ 382, 415.

Limitation to action—When cause of action accrues on promise to pay as soon as able—Interpretation of such a promise—Question of ability to pay, when should be submitted to jury.

A cause of action on a promise to pay a debt the moment the debtor is able accrues as soon as the debtor has the pecuniary ability to pay the debt.[1]

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Tebo v. Robinson.

A promise by a debtor to pay his debt "the moment he was able" is to be reasonably interpreted; [3] on the one hand it does not imply ability to pay without embarrassment, or even without crippling the debtor's resources or business, while on the other hand ability to pay cannot be fairly implied while the debtor, although he may be in possession of property sufficient to pay the particular debt, is plainly insolvent, or when payment, if enforced, would strip him of his means of support; [3] and proof that the debtor at a particular time subsequent to making the promise had property equal to, or greater than the amount of the debt, would not conclusively show that he was able to pay the debt.[5]

Where, in an action for borrowed money upon a promise by the defendant to pay it the moment he was able, the only defense was the statute of limitations, and the evidence was that the defendant, more than six years before the commencement of the action, had to his credit in a bank sometimes more, sometimes less than the amount of the plaintiff's claim, and owned a seat in the New York Stock Exchange worth $5,000, and there was no other proof that he had other property, or whether he owed any debts other than his debt to plaintiff, and the plaintiff testified that more than six years before the commencement of the action the defendant had said that he had not seen a time since he borrowed the money that he could pay it, that his wife needed a shawl, and he was not able to buy her one, and the plaintiff could rest assured that he would pay the debt as soon as he was able to,—*Held*, that the question of fact as to whether the defendant had been able to pay the debt more than six years before the commencement of the action should have been left to the jury.[4]

(*Decided October* 6, 1885.)

Appeal from judgment of the supreme court second department affirming a judgment of non-suit rendered at a circuit of the supreme court in Kings county.

Reported below, 29 *Hun*, 243.

This action commenced by plaintiff on November 15, 1881, to recover $1,000, money loaned by him to the defendant prior to October 19, 1872 and was founded on a promise contained in a letter written on that day by the defendant to the plaintiff, to pay the debt "the moment he was able." The complaint

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alleged that the defendant was able to pay the money before the commencement of the action, but specified no time when he had such ability. The only defense set up in the answer was the six years statute of limitations. The plaintiff was non-suited at circuit, on the ground that the defendant had been able to pay the debt prior to November 15, 1875, and the cause of action was therefore barred by the statute of limitations. Other facts are stated in the opinion.

J. T. Marean, for plaintiff-appellant.

Mirabeau L. Towns, for defendant-respondent.

ANDREWS, J.—The promise of the defendant contained in the letter of October 19, 1872, was conditional. It was to pay the debt, the moment he was able. The cause of action on this promise accrued as soon [*] as he had the pecuniary ability to pay his debt. Proof that the defendant, at a particular time, subsequent to October 19, 1872, had property equal to or greater than the amount of the plaintiff's debt, would not conclusively show that he was able to [*] pay the debt within the meaning of the promise, so as to give a right of action. This fact might be of such a character that to deprive him of it, would take away his means of livelihood, as effectually as depriving a mechanic of his tools would deprive him of means of support. The meaning of a promise to pay when able is to be reasonably interpreted. [*] On the one hand, it does not imply ability to pay without embarrassment, or even without crippling the debtor's resources or business, while on the other hand ability to pay cannot be fairly implied while the debtor, although he may be in possession of property suffcient to pay the particular debt, is plainly insolvent, or when payment, if enforced, would strip him of

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his means of support. The creditor or a promisee of this kind, reposes very much on the good faith of the promisor. He generally relies upon the debtor making known any change in his pecuniary circumstances which enables him to pay the debt, although there is no duty of voluntary disclosure. It is not contemplated by the parties that the debtor will pay the debt out of earnings necessary for the support of himself or his family, or that he will pay the particular debt to the prejudice of other creditors whose debts are absolute and unconditional.

The present action was commenced November 15, 1881. The only defense is the statute of limitations. The trial judge granted a non-suit, on the ground that it was shown that the defendant was able to pay the debt prior to November, 1881, and more than six years before the commencement of the action. We think the court erred, and that this question should have been submitted to the jury. It appeared from the bank account of the defendant, that prior to November, 1881, the balance to his credit was sometimes more and sometimes less than the amount of the plaintiff's claim, and that at all times there was a balance of several hundred dollars in his favor. It was also shown that the defendant was a broker, and that from prior to 1873 he was a member of the stock exchange, in the city of New York, and that his seat in the exchange was worth in 1875, $5,000. There was no proof that he had any other property, and whether he owed any debts other than the debt to the plaintiff was not disclosed. It may be assumed that the case made by the defendant, *prima facie*, establishes the fact of his ability to pay plaintiff's debt, prior to November, 1865. But he testifies that on October, 1875, at an interview between himself and defendant, in which the payment of the debt was alluded to, the defendant said that he has not seen a time since he borrowed the money that

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he could pay it, and his wife needed a shawl and he was not able to buy her one, and added that the plaintiff could rest assured that he would pay the debt as soon as he was able to. We think it was a question for the jury, upon this evidence, whether up to the time of this conversation the defendant was able [*] to pay the plaintiff. The bank account and the ownership of the seat in the stock exchange, were not necessarily inconsistent with an inability to pay the plaintiff's debt prior to that time. The jury should have been permitted to pass upon the question. No change in the pecuniary circumstances of the defendant was shown to have occurred between the time of this conversation in October, and the November following, and the jury would have been justified in assuming that on change had taken place. If the ability to pay the plaintiff's debt did not exist prior to November, 1875, the cause of action was not barred in November, 1881, when the action was commenced.

The judgment should be reversed, and a new trial granted.

All concurred.

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SANFORD, RESPONDENT, v. CROCHERON, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, MAY, 1885.

§§ 992, 995, 996.

Interest—When demand note draws—Effect of general exceptions to refusal to charge.

Where a note payable on demand was not made payable with interest, interest does not begin to accrue thereon until payment has been demanded, but it draws interest from the time of a demand, even though the note was not produced when the demand was made, if there was no mistake between the parties as to the nature of the obligation the payment of which was demanded.[1]

Where a request to charge consisted of two distinct propositions, one of which was correct and the other unsound, and both of which the judge declined to charge, and a general exception only was taken to such refusal,—*Held*, on appeal, that such exception would not warrant the reversal of the judgment.

Willetts v. Sun Mutual Ins. Co., (45 *N. Y.* 45), Smedis v. Brooklyn, &c. R. R. Co. (88 *Id.* 13), followed.[2]

(*Decided May* 8, 1885.)

APPEAL from judgment entered upon a verdict rendered at a circuit in New York county. The opinion states sufficient facts.

James M. Lyddy, for defendant-appellant.

Theron G. Strong, for plaintiff-respondent.

DANIELS, J.—The action was upon a note made by the defendant, and dated on November 2, 1871, by which on demand he promised to pay to the order of

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the plaintiff $2,153.55. The amount of the recovery was to a large extent placed upon the liability of the defendant to pay interest upon the debt, and on that account it has been chiefly drawn in question by the appeal. The note itself was not payable with interest, and the plaintiff accordingly had no right to claim it until the debt became due. But he testified, as a witness upon the trial, that he demanded payment of the note before December 9, 1873, and such demand had been made half a dozen to a dozen times. The fact of payment of the note having been demanded by the plaintiff at the times referred to by him, or at any other time, was positively denied by the defendant in his evidence upon the trial. And as nothing had transpired to entitle the plaintiff to interest upon the note unless a demand for its payment had been
[1] made, it was an important inquiry in the case whether his evidence upon this subject was entitled to credit. If it was, then the plaintiff was entitled to recover interest upon the debt, even though he did not produce the note to the defendant at the time when the demand was made, for there could have been no misunderstanding between them as to the nature of the obligation the defendant was requested to pay.

At the close of the evidence, among other requests which were made, the defendant's counsel requested the court to submit the case to the jury upon the question whether a demand of payment had in fact been made, and if that request had been presented separate and distinct from any other, it would have been error for the court to have refused to submit the question to the jury, for by no other fact which the evidence tended to prove could the plaintiff have legally claimed to recover interest upon the debt. But it was not so presented. For, in addition to the request to submit this disputed matter of fact to the

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jury, there was also united with it the further request that the court should direct a verdict in favor of the defendant on the ground that the evidence showed that the principal of the debt had been paid, and no action for interest would lie after that.

This last proposition was not sound, for if the debt had been demanded, and interest had on that account accrued upon the note, the payments which were made, applied first to the extinguishment of the interest or equally upon the interest and the debt itself. The court could not therefore direct a verdict in the defendant's favor upon the theory that the principal of the debt had been wholly paid, and the interest alone had been left unpaid. This part of the request, therefore, could not legally have been complied with by the court, and the decision was right so far as it overruled and denied it. And as it was right to that extent, and a general exception only was taken to the ruling of the court denying compliance with this latter request, and that for the submission of the controverted subject of a demand to the jury, the exception so taken can be of no profitable avail to the defendant, for it fails to raise or present the question which has been argued on this part of the appeal.

As the request was made, it consisted of two legal propositions, in one of which the defendant's counsel was right, and in the other of which he was in error. They were presented together, the court disposed of them in that manner, and to the disposition which was made a general exception was taken. And the settled rule of practice is that such an exception will not aid the party taking it, although a part of the refusal denied should have been charged in his favor.

Under circumstances quite analogous to the present case, it was said in an opinon of the court of appeals that "This was a request embracing several propositions, distinct though related. If there was any one of

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them which the learned judge might correctly refuse, as a unit, to adopt, he was not in error in refusing to adopt the whole for the reason that it contained that one. He was not to be compelled to separate them, picking out and refusing to charge only the bad" (Willetts *v.* Sun Mutual Ins. Co., 45 *N. Y.* 45, 49; Smedis *v.* Brooklyn, &c. R. R. Co., 88 *N. Y.* 13).

The defendant's case was not rectified in this respect by the exception mentioned at its close, for that contains no more than an exception to each and every refusal to submit the case to the jury, and the refusal embodying this inquiry concerning a demand, as has already been stated, included another proposition which the defendant was not entitled to have submitted to the jury. In that respect the case differed materially from Dunckel *v.* Wiles (11 *N. Y.* 420, 427).

There was no legal theory included in the case on which a verdict for the defendant could have been directed, but assuming, as that was done by the court, that a demand of payment had been made, the plaintiff was entitled to recover something. If the demand was made at the time when he stated that to have been done, he was entitled to recover all that was included in the verdict, according to an admission made at the close of the plaintiff's evidence. The controlling inquiry was whether this demand had been made or not, and the defendant deprived himself of his right to complain of the omission of the court to submit that question to the jury by the manner in which the exception to the request containing it was taken. And as no other points in the case require consideration, it follows that the judgment should be affirmed.

DAVIS, P. J., concurred. BRADY, J., dissented.

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POTTER, RESPONDENT, *v.* POTTER, APPELLANT.*

CITY COURT OF NEW YORK, GENERAL TERM, FEBRUARY, 1885.

§§ 446, 447, 449, 1759.

Parties to action—When trustee in agreement for separation not necessary party to action on covenants therein.

The provisions of sections 449 of the Code of Civil Procedure, that the trustee of an express trust may sue without joining the beneficiary, is permissive only, and does not forbid an action by the beneficiary.

Where an agreement was made between a husband and wife and a trustee, for a separation, the wife may sue upon covenants contained therein made for her exclusive benefit, and the trustee is not a necessary party to the action. The fact that the agreement contained covenants on the part of the trustee to indemnify the husband against any debts or liabilities contracted by the wife, does not make it necessary that he should be made a party to the action.

Where articles of separation between husband and wife provided for the payment of a certain sum monthly to the wife during her natural life, and that if she procured a divorce she should not ask alimony but accept such payments in lieu thereof,—*Held*, that having obtained a divorce, and, relying upon the agreement, failed to ask for alimony, she should be permitted to assert her rights under the agreement as effectually as if they had been secured to her by the decree of the court.

(*Decided February* 24, 1885.)

Appeal from judgment overruling demurrer to complaint.

This action was brought upon an agreement for a separation and separate maintenance, dated July 10, 1880, and executed under seal by the defendant as the party of the first part, by the plaintiff (who was then his wife) as the party of the second part, and by H.

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F. Hepler, as trustee for the plaintiff, of the third part. It is in the usual form of such agreements, and recites that divers unhappy differences have arisen between the plaintiff and defendant, by reason of which they have consented and agreed to live separate and apart from each other during their natural lives. The covenants contained in the agreement bearing upon the questions discussed in the opinion were:

First. The defendant's covenant to and with the trustee, and also "to and with his said wife" (the plaintiff) that he would well and truly pay or cause to be paid, for and toward the better support and maintenance of his said wife (the plaintiff), the sum of $1,200 per annum during her natural life, payable in monthly installments of $100 each, at the office of the defendant in the city of New York, on the first Monday of each month.

Second. The wife's (the plaintiff's) agreement to accept this sum in full satisfaction for her support and maintenance, and her further agreement that in the event of a divorce being obtained, no relief shall be asked for by way of alimony or support, but that the financial relations of the parties towards each other shall remain as they were in said agreement fixed and agreed upon.

Third. The covenant of the trustee, in the form usual in such cases to indemnify the husband against any debts or liabilities contracted by the wife.

The complaint, after setting out the agreement, alleged that immediately after its execution the parties separated and have ever since lived apart. It also averred that on November 5, 1881, a decree of divorce was granted to the plaintiff from the defendant, in and by which no alimony was asked for or granted, she relying upon the provisions of the aforesaid agreement. The complaint then alleged a balance due of $525

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when the action was commenced, with an averment of demand and refusal to pay.

The defendant demurred to the complaint upon the ground that there was a defect of parties plaintiff, in this, that the trustee ought to have been joined, and that the complaint did not state facts sufficient to constitute a cause of action.

The demurrer was overruled at special term, and from the judgment thereupon entered, the defendant took this appeal.

W. I. Washburn, for defendant-appellant.

H. A. Nelson, for plaintiff-respondent.

McAdam, Ch. J.—The plaintiff is a party to the agreement, and the covenant sued upon was made for her exclusive benefit, so that, being the real party in interest, she is entitled as of course to maintain an action upon it (*Code*, § 449). The provision of that section, —that the trustee of an express trust may sue without joining the beneficiary,—is permissive only, and does not forbid an action, by the beneficiary (Hubbell *v.* Medbury, 53 *N. Y.* 98). If the plaintiff, as the real party in interest, is authorized to maintain the action, it follows that the trustee is not a necessary party plaintiff. The defendant argues that as the covenants of indemnity to the husband were essential considerations for the entire contract, that the defendant should have the opportunity of setting up breaches of the covenants, if such exist, as defenses to any action on the alleged contract, and that for this reason, if no other, the trustee ought to have been joined as a party plaintiff. We fail to discover any force in this suggestion, as it was competent for the defendant in the present action to plead any breaches of the agreement sued upon, and, if necessary, the defendant might have had

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the trustee brought in as a party defendant (*Code*, 452).

But the defendant has not made it appear in any legal manner that the presence of the trustee, either as a party plaintiff or defendant, was necessary to a complete determination of the controversy. He has by his demurrer admitted the truth of all the facts charged in the complaint, and the question to be decided is whether, on these conceded facts, the plaintiff is entitled to maintain the action or not, and we will immediately proceed to the consideration of this question.

The promise sued upon was not made to the trustee exclusively, but, in the language of the agreement, was made "to and with the said trustee, and to and with the said wife." The covenants are independent, and the one sued upon was, as before remarked, made for the exclusive benefit of the wife, and we see no legal reason why she cannot enforce it. The trustee might have maintained the action in his own name as trustee of an express trust without joining the wife (*Code*, § 449; Dupre *v.* Rein, 7 *Abb. N. C.* 256); and by analogy the real party in interest may sue without joining the trustee. Why not? The moneys paid under the agreement were to belong to the wife, whether collected by her or by the trustee. This is particularly so in this case, because, as the complaint alleges and the defendant by his demurrer admits, the plaintiff obtained a divorce from the defendant on the fifth day of November, 1881, and the latter paid the agreed allowance of $100 per month regularly up till December 1, 1881, and has since that time paid various smaller amounts up to and including June 4, 1883, leaving the balance now claimed due.

The divorce was taken without alimony, the wife relying upon that portion of the agreement which provides that if she obtained a divorce no alimony should

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be applied for, but the financial relations of the parties were to continue as fixed by said agreement. Such a relinquishment by the wife would have constituted a good consideration, even against creditors, for any conveyance of property which the defendant might have made to her by way of settlement (Hobbs *v.* Hull, 1 *Cox*, 445; Nunn *v.* Ladbrooke, 8 *Term R.* 521). In Kamp *v.* Kamp (46 *How. Pr.* 143), the wife, who had obtained a divorce, was permitted to maintain an action against her husband to set aside as fraudulent, a conveyance made by him for the purpose of defeating the order for alimony.

The wife in the present instance took her divorce without alimony, upon the faith of that portion of the agreement which provided for such a contingency. She obtained her freedom from him, and ought to be permitted to assert her rights under the agreement as effectually as if these rights had been secured to her by the decree of the court. The decree terminated the husband's liability for any future debts on her account and discharged the trustee from any future liability to the husband. The trustee since then has been trustee only in name, while the contract has ripened into one in which she and her late husband are alone interested—he as the paymaster; she as the beneficiary. The contract is, in legal form, made through the intervention of a trustee, and unless there is some technical barrier interposed by the law, which sacrifices substance for form, and which, in consequence, prevents the plaintiff from enforcing her legal rights under the contract—which she seems to have observed in good faith—we think she is entitled to receive that justice in a court of law that any other suitor is entitled to demand. She is the real party in interest; the covenant was made for her benefit (Todd *v.* Weber, 95 *N. Y.* 181; Lawrence *v.* Fox, 20 *N. Y.* 268); the trustee has no present interest in its performance, and, with-

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out considering what her status would have been before the Code (a duty rendered unnecessary), it seems to us that, under the broad provisions of section 449 (*supra*), she is entitled to maintain the action (see Desbrough *v.* Desbrough, 29 *Hun*, 592); that the trustee, if a proper, is not a necessary party to the action; that his presence is not required in its determination, and that the demurrer was properly overruled.

The judgment entered upon the order will therefore be affirmed, with costs.

ESTATE OF LUCINDA LEE MORGAN, DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY, JULY, 1885.

§ 2817.

Testamentary trustee—Removal of, on account of insolvency—What is not sufficient evidence of unfitness.

The entry of an order requiring a testamentary trustee to give security and his neglect or refusal so to do are necessary preliminaries to the removal by the surrogate of a trustee on the ground of insolvency.[1]

The remedy which the law affords a *cestui que trust* of bringing about in a proper case the removal of his trustee is prospective in character and has for its chief, if not its exclusive object, the future security and good management of the trust estate.[4]

The act or omission for which a court of equity will remove a trustee must be such as endangers the trust property or shows a want of honesty or of proper capacity or of reasonable fidelity.[2]

Where one of two testamentary trustees conveyed certain property to a third person, and the trustees thereupon loaned a part of the trust moneys upon a mortgage on such premises, executed by the grantee to them, and the proceeds of this loan came to the hands of the trustee who conveyed the property, and was used in the business of a firm of which both trustees were members, and it appeared that

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the mortgage was an adequate security for the loan and that the rate of interest agreed upon was as high as was at the time of making the loan obtainable,—*Held*, that the trustees were not guilty of such a breach of trust in making said loan as would demonstrate their unfitness, under section 2817 of the Code of Civil Procedure, to be continued in office; [2] and an application for their removal should be denied.[1, 2]

(*Decided July* 28, 1885.)

Application by a *cestui que trust* for the removal of testamentary trustees.

The opinion states sufficient facts.

ROLLINS, S.—This is an application for the removal of Henry Morgan and Edward Morgan as testamentary trustees of several trusts created by the will of Lucinda L. Morgan, deceased.

The petitioner, a grandson of the testatrix, is entitled, so long as his uncle, Matthew Morgan, shall live, to one one-twenty-fourth part of the income of a certain fund of $125,000. Upon the death of Matthew Morgan, the principal of that fund is to go to his children, if any shall survive him, and to the issue of any children deceased; in case there shall be no such children or issue then to a class in which this petitioner, if living, will be included.

The securities in which the funds of this trust are invested are not in the hands of either of the persons whose removal is here sought, but are in the sole possession of their co-trustee, Mr. Charles E. Butler. The respondents allege and the petitioner does not deny that these funds are intact, and that Mr. Butler's pecuniary responsibility is abundantly assured.

The petitioner has moreover a contingent interest in certain other trusts created by decedent's will, the funds of which trusts are now under the control of the

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respondents, and are contained in the vaults of safe deposit and trust companies.

The alleged grounds upon which this application for removal chiefly rests, and the only ones that seem to me worthy of consideration, are these:

1st. That in June, 1884, these respondents failed in business and have ever since been hopelessly insolvent.

2d. That they have applied to their own use certain moneys belonging to the trusts above specified.

First. The fact of the insolvency of these respondents is admitted by their answer. Does that fact of itself call for their removal? There are English decisions which recognize the bankruptcy or insolvency of a testamentary trustee, as *ipso facto* a just cause for depriving him of his trust. The rigor of this rule has of late been somewhat relaxed, and the question of removal or non-removal for such a cause is now in any given case determined according to its peculiar facts and circumstances.

In the courts of this country insolvency seems to have been generally regarded as insufficient ground for the removal of a trustee unless by reason of it the trust funds have been brought into jeopardy. Within the limitations of the Code of Civil Procedure I greatly doubt whether a testamentary trustee can lawfully be removed by the surrogate, on account of precariousness of his pecuniary circumstances, until he has first neglected or refused to comply with an order requiring him to give security for the protection of his *cestuis que* trustent. Neither poverty nor insolvency is named in section 2817 as one of the grounds for which a removal may be made; but among those grounds the failure of a trustee to give bond as required by a decree of the surrogate, made in pursuance of section 2815, is distinctly specified.

Section 2815 declares that upon the disclosure of any facts respecting a testamentary trustee which, if

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shown to exist in the case of an executor, would justify an order requiring him to furnish security as a condition of receiving letters testamentary, such security may be in like manner exacted from such testamentary trustee.

This refers of course to section 2638, which provides among other things for the giving of a bond by an executor when "his circumstances are such that they do not afford adequate security" for the due administration of his trust.

[1] I hold, therefore, that the entry of an order requiring the giving of security, and neglect or refusal to comply with such order, are essential preliminaries to the surrogate's removal of a trustee upon the ground of insolvency. Those preliminaries are here wanting.

Second. Should this petition be granted on account of the action of the respondents in investing $35,000 of the funds in their hands in the New York Hotel mortgage? Was that investment, within the meaning of section 2817, *ante*, "an improper application" of trust moneys, or an investment in "securities unauthorized by law?" And if it was, does the act of the trustees in relation to it show them to be, within the meaning of such section, "unfit for the due execution of their trust?" It seems to me that the words last quoted must be regarded as a legislative sanction of a familiar doctrine of equity jurisprudence which is expressed by Judge STORY (2 *Eq. Jur.* § 1289) in these words:

[2] "It is not every mistake or neglect of duty or inaccuracy of conduct which will induce courts of equity" to remove a trustee. "The acts or omissions must be such as to endanger the trust property, or to show a want of honesty or of proper capacity or of reasonable fidelity" (See also Thompson *v.* Thomp-

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son, 2 *B. Mon.* [*Kentucky*] 245; Lathrop *v.* Smalley, 23 *N. J. Eq.* 192; Matthews *v.* Murchison, 17 *Fed. Rep.* 760).*

* The following case furnishes an illustration of the application of this rule to a proceeding for the removal of a testamentary guardian.

IN RE KING.

SURROGATE'S COURT, NEW YORK COUNTY, JULY, 1885.

§§ 2472, 2832, 2858.

Testamentary guardian—Removal of.

One who is a lawful incumbent of the officer of guardian, either by appointment of the surrogate or by virtue of a testamentary provision, cannot be removed by the surrogate until such facts and circumstances have been established as furnish statutory warrant for his supersession. [1]

A testamentary guardian can be removed only where a testamentary trustee can be removed. [2]

Instance of case in which a guardian was not guilty of misconduct that would warrant her removal. [3]

(*Decided July* 24, 1885.)

ROLLINS, S.—This proceeding is brought by Donald Mackay, as one of the executors of Elizabeth R. B. King, deceased, for the removal of Phebe Fullerton, the testamentary guardian of Mrs. King's children.

It is provided by subdivision 7 of section 2472 of the Code of Civil Procedure, that the surrogate's authority to supersede the guardian of an infant "must be exercised in the cases and in the manner prescribed by statute."

[1] In view of these restrictive provisions it is manifest that one who is a lawful incumbent of the office of guardian, either by appointment of the surrogate or by virtue of a testamentary provision, can successfully resist in this court an application for his removal, until such facts and circumstances have been established as furnish statutory warrant for his supersession (Matter of Kerrigan, 2 *McCarty's Civ. Pro.* 334; Ledwith *v.* Union Trust Co., 2 *Dem.* 439).

The various causes which will justify the surrogate in removing *a guardian appointed under title* 7 of chapter 18 of the Code, are fully set forth in the six subdivisions of section 2832. It is declared in the last of these subdivisions that a guardian of the person may be deprived of his office whenever "the infant's welfare will be promoted by the appointment of another guardian."

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[*] Now there is little or no controversy as to the facts connected with the investment in question. Henry Morgan, being the owner of an undivided four-

The legislature has seen fit to restrain the surrogate's authority [*] as regards *testamentary guardians* within somewhat narrower limitations. He can only direct the removal of such a guardian upon the grounds assigned in section 2858: that is, "in cases where a testamentary trustee may be removed as prescribed in title 6 of this chapter." This is a reference to section 2817, whose second subdivision alone has any possible application to the case at the bar. If, within the meaning of that subdivision, this respondent has been guilty of "misconduct in the execution of her trust," and has thereby become "unfit" to be continued in her office, she must be removed; otherwise the surrogate is powerless to displace her.

[*] Now there are no allegations in this petition that seem to me to require comment, except such as are in some way associated with the shameless behavior of the respondent's son, Richard Butler, towards the children, whom their mother had, by testamentary direction, intrusted to the respondent's care. I am so profoundly impressed with the truth of these revelations and with the desirability of placing these infants under new conditions, not only for preventing future mischiefs, but for effacing from their minds, if possible, the memory of indignities which they have already suffered, that if I had power, under the circumstances here existing, to substitute another guardian in place of this respondent, I should not hesitate to exercise it. But have I such power? It is not suggested that the respondent connived at her son's disgraceful practices, and it is not claimed that she ever heard of them until about the time when they came to the knowledge of the petitioner. Nor does it appear that she knew or had reason to believe that evil consequences were likely to flow from the intimate relations that were allowed to exist between these children of a common household. Her treatment of her son since the discoveries which gave rise to the present proceeding has furnished no just cause for criticism. She is taken to task by petitioner's counsel for protesting her belief in the boy's innocence. But her credulity is perhaps not unnatural in a mother, and it does not seem to have betrayed her into any act or omission that can fairly be interpreted as "misconduct in the execution of her trust."

This petition must therefore be denied.

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teenth part of the New York Hotel property, conveyed the same in May, 1884, to Joseph B. Pigot, who thereupon executed a mortgage to these trustees to secure a loan of $35,000.

The proceeds of this loan came to the hands of Henry Morgan and were subsequently used in the business of M. Morgan's Sons, a firm whereof both these respondents were members. Apart from the fact that they themselves were in effect the borrowers of funds held by them as trustees, their conduct in this transaction is not assailed, and is apparently not assailable. The investment was such an one as is approved by the courts of this State, to wit, a first mortgage upon real property. That mortgage seems to afford adequate protection for the repayment of the loan, and, for aught that is disclosed in the papers before me, the rate of interest which was agreed upon between the parties was as large as was obtainable at the time such loan was effected.

Whatever adverse criticism may properly be made upon the course of the respondents in this matter of the Pigot loan, they are deserving of less severe censure than they would have merited if they had exposed the trust funds to the hazards of any speculative enterprise or had applied them to their own use upon their mere personal security.

It is true that the proceeds of the loan were employed in ways that they presumably expected would lead to their private advantage, and they may accordingly have become amenable to some of the consequences which follow from a trustee's acting or contracting in any manner for his own benefit in regard to the subject of his trust.

To recognize the right of a trustee to lend to himself directly or indirectly, and even upon undoubted security, the funds committed to his care, would be to open a door to many and palpable mischiefs.

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This petitioner claims that the moneys loaned upon the security of the Pigot mortgage have never lost their character as trust funds, and that the *cestuis qui trustent* may now insist, at their option, upon charging the respondents with interest thereon at a high rate, or upon claiming all profits and advantages that such respondents may have derived from the transaction.

Whether this contention is sound or not need not here be determined. In the settlement of the respondents' accounts, it may be hereafter the subject of consideration. But, assuming that they have transgressed the strict line of their duty, they have not, in my judgment, been guilty of any such palpable breach of trust as to demonstrate their "unfitness" under section 2817 to be continued in office. The remedy which the law affords a *cestui qui trust* of bringing about in a proper case the removal of his trustee, is prospective in its [*] character, and has for its chief, if not indeed for its exclusive object, the future security and good management of the trust estate (*Hill on Trustees*, 190).

Such a remedy is not needed in the case at bar, for there is no cause for apprehension that the retention in office of these respondents until the termination of the proceeding pending in the supreme court for their accounting and discharge is likely to put in the slightest jeopardy the rights of this petitioner or of the other *cestuis qui trustent*, whose combined interests are much larger than his own, and who favor the retention rather than the removal of the offending trustees.

My resolution to deny this petition is confirmed by a fact to which I have already adverted. Before the day of its filing, the respondents evinced their purpose of voluntarily surrendering these trusts, and to that end instituted proceedings in the supreme court. Those proceedings may be pushed to a speedy termin-

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ation and the petitioner may thus obtain in substance the very relief for which he here prays.

Petition denied.

SMITH v. GREEN.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, SEPTEMBER, 1885.

§ 3230.

Allowance—Instance of action between partners for an accounting in which, denied.

Where in an action between partners for a settlement of the partnership accounts, a referee was appointed to take and state the accounts of a receiver of the partnership assets, and the order of reference required the referee to examine and pass upon the claims of creditors of the firm, and the referee determined and reported that certain claims of creditors were valid and payable and that the plaintiff was indebted to the defendant, and it appeared that the firm assets were sufficient to pay the fees of the receiver, his counsel, and the referee, and a part only of the firm debts,—*Held*, that the referee properly refused to grant an allowance to the defendant notwithstanding he recovered a judgment against the plaintiff.

(*Decided September* 19, 1885.)

Motion by plaintiff to confirm referee's report.

This action was brought to secure a dissolution of a partnership existing between the plaintiff and defendant under the firm name of Smith & Green, and to procure a settlement of their accounts. On December 31, 1884, one William H. Ricketts was duly appointed receiver of the goods, chattels and credits of the firm. Thereafter he converted the assets of the firm, as far as practicable, into money, and pursuant

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to an order of the court advertised for claims against the copartnership, three of which duly proved were filed with him.

On May 18, 1885, an order was entered appointing Augustus C. Brown, Esq., referee "to take and state the accounts of the said receiver in the manner of such accountings," and directing the referee to "ascertain and report the amount to be paid to said receiver for his compensation and in addition to his fees, a counsel fee." The order also contained the following directions: "And it is further ordered that the said referee shall examine and pass upon the said claims so filed with the said receiver as to their validity and priority, respectively, and for that purpose may examine either of the parties and their books of account and may take any testimony as he may deem competent and proper. And if any objection be made to any of said claims, notice of such objection shall be given to the claimants respectively, and the said claimants shall be permitted to appear before the said referee in support of their respective claims. And he shall also determine what amounts if any should be allowed out of the funds in the hands of the receiver to the parties to the action for their necessary expenses including the fees of counsel incurred in any of the proceedings in this action."

June 22, 1885, the referee filed his report, whereby he found and determined that there was due and payable to the defendant from the plaintiff the sum of $449.21; that the claims filed with the receiver amounting in the aggregate to $1,419.16 were valid and payable; that the sum of $1,060.74 was in the hands of the receiver; that he should be allowed $25 for extra compensation; and the receiver's counsel should be allowed $125 for his services; and that an allowance should not be made to either of the parties. The defendant excepted to the refusal to grant him an

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allowance, and the plaintiff made this motion to confirm the report.

William F. Scott, for plaintiff and motion.

Sidney J. Cowen, for defendant, opposed.

Creditors, as such, have no specific lien on the partnership property. The rule which appropriates it to the payment of firm debts in preference to those of individual partners is for the protection of the partners, not for the benefit of the creditors. Robb *v.* Stevens, *Clarke*, 191; Ketchum *v.* Durkee, 1 *Barb. Ch.* 480; Kirby *v.* Schoonmaker, 3 *Id.* 46. The creditors have no equity as creditors. The partners have the equity for the discharge of their debts . . . . 2 *Van Santvoord's Eq. Prac.* 202 . . . . In cases of partnership accounting where neither party is in fault or the accounts are intricate or doubtful, no costs are allowed *inter partes*, but they are usually charged on the fund. 2 *Van Santvoord's Eq. Prac.* 211. Costs when awarded are not always directed to be paid by one party to another. Whenever an estate, whether real or personal, is the subject of litigation, the court will, in general, order the costs of the suit or those of some of the parties to it, to be defrayed out of the fund or estate. 2 *Barb. Ch. Prac.* 328.

Samuel S. Thomas, for receiver.

DONOHUE, J.—Motion to confirm referee's report. This action was between two partners, to settle the partnership affairs. No answer was interposed, and, on motion of the parties, an order of reference was made to ascertain the amount of debts, and what if any, surplus remained and, on payment of the debts, how the partners would stand. The result of the reference was to find that there is nothing due the plaintiff, but

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there is due defendant about $400, and that there is not enough in the receiver's hands to pay the creditors. Defendant, who has obtained a judgment in his favor for $400, excepts to the report because he is refused an allowance. No authority is cited that goes to the length of showing that when the creditors have been made parties—as they are, by the order for payment—and there is not enough to pay them, and both the plaintiff and the defendant are liable for the deficiency, any sum should be taken from the creditors to pay an allowance to the parties. The allowance is not to counsel, but to the parties; and, on principle, I cannot see how I would be justified in taking money to pay an allowance to a party who would be liable to the creditors for the deficiency made or increased by the said money thus taken; and on the exception the referee should be sustained.

SANDERS, RESPONDENT, *v.* EULING, AS PRESIDENT OF THE TURTLE BAY PARK ASSOCIATION, LIMITED, APPELLANT.

N. Y. COURT OF COMMON PLEAS, BEFORE EDWARD S. DAKIN, REFEREE, MAY, 1884; ALSO, GENERAL TERM, JUNE, 1885.

§§ 1919 *et seq.*

Joint stock association—May be sued by member—Evidence—Right of witness to use bill of particulars to refresh memory.

Since the passage of chapter 258 of the laws of 1849, and chapter 448 of the laws of 1851,—providing for suits by or against a joint stock company through its president or treasurer, for which sections 1919 *et seq.* of the Code of Civil Procedure are a substitute,—any

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unincorporated association having a president or treasurer may be sued by a member of the association in an action against either of those officers. [1, 2, 3, 7, 9]

Waterbury v. Merchant's Union Express Co. (50 *Barb.* 158), [4] Westcott v. Fargo (61 *N. Y.* 542), [5, 6] Strebe v. Albert (1 *City Ct. R.* 376), [8] followed. McMahon v. Rauhr (47 *N. Y.* 67), distinguished. [6]

A witness has a right to use a bill of particulars to refresh his memory as to particular items, each of which he testified he recollected apart from the paper.[10]

The admission of evidence objected to on the ground that the subject to which it relates has been exhausted, is in the discretion of the referee before whom the case is being tried.[10]

Instance of a case in which the evidence, on a question of fact in a case, was sufficient to make it one to be determined by the referee before whom the cause was tried. [11, 2]

(*Decided by Referee, May* 14, 1884; *at General Term, June* 1, 1885.)

Motion before referee to dismiss complaint; also appeal from judgment in favor of the plaintiff, entered upon the report of the referee.

The action was tried before Edward S. Dakin, as referee. The plaintiff was examined as a witness in his own behalf, and was permitted to use a bill of particulars served by him to refresh his memory although it was not in his handwriting, after he had testified that he had an independent recollection of the items.

The bill of particulars was made up by the plaintiff's attorney from a memorandum furnished by the plaintiff. This memorandum (to which the plaintiff also referred to refresh his memory) was prepared from the books of the defendant's association by its book-keeper, he having written it while the plaintiff read off the items from the books.

The defendant moved, just before the case was closed, to dismiss the complaint, upon the ground, among others, "that the plaintiff is a member of the Turtle Bay Park Association, which is a voluntary

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unincorporated society, and he cannot therefore maintain this action," and the referee in determining the motion, wrote the opinion reported below. Other facts are stated in the referee's opinion.

Ashbel P. Fitch, for defendant and motion.

Seaman & Conger, for plaintiff, opposed.

EDWARD S. DAKIN, Referee.—This action is brought by the plaintiff against the defendant, as president of the Turtle Bay Park Association, limited, to recover an installment of salary alleged to be due him as manager under a contract with such association, and for money advanced and paid by plaintiff to and for the account and benefit of said association. The association consisted of thirty members, of whom the plaintiff was one. The members of the defendant association instituted proceedings to become incorporated, but such proceedings were never carried on to completion. After the preliminary steps were taken to form such corporation, meetings of the members were held, subscriptions to the joint capital stock made, president, treasurer and other officers were appointed, and under such organization business was actually carried on for a considerable period of time. Under these facts the defendant claims that the plaintiff cannot recover in this form of action against the defendant, for the reason that plaintiff and defendant were, in legal effect, general copartners, and that an action, if maintainable at all, should have been for the dissolution of the copartnership and an accounting.

Prior to any statutory enactment, upon the conceded facts as to the organization of the defendants, their acts would have, I think, undoubtedly created a copartnership relation between plaintiff and defendant, both as between themselves and as between third par-

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ties dealing with them, and on well recognized principles an action in the present form would not have been maintainable by the plaintiff. It is important, therefore, to examine whether that status has been changed by statute in this State.

The statute of 1849, chap. 258,* provides, among other things, that any joint stock company or association consisting of seven or more shareholders can sue and be sued in the name of its president or treasurer. Under the language of the act it is doubtful whether voluntary unincorporated associations not organized under the statutes as joint stock companies were included within the scope of its provisions (Tibbetts *v.* Blood, 21 *Barb.* 650).

[*] A further statute (Laws 1851, chap. 455)† was subsequently passed, and remains unrepealed on the statute-book, extending the provisions of the act of 1849 to any company or association composed of not less than seven persons, who are owners of or have an interest in any property, right of action or demand, jointly or in common, or who may be liable to any action on account of such ownership or interest. This latter act is far more comprehensive than the act of 1849, and has been held to extend to all voluntary unincorporated associations having a president or treasurer (Tibbetts *v.* Blood, 21 *Barb.* 650; Dewitt *v.* Chandler, 11 *Abb. Pr.* 459; Bridenbeker *v.* Hoard, 32 *How. Pr.* 289).

[*] It seems to me that defendants, consisting of more than seven members, and organized by the

* Repealed by Laws of 1880, chap. 245, § 1, subd. 26.

† The statement in the opinion that chapter 455 of the Laws of 1851, remains unrepealed, is erroneous. That act was repealed by the Laws of 1880, chap. 245, § 1, subd. 28. It is practically embodied in section 191 of the Code of Civil Procedure, and the provisions of chapter 258 of the Laws of 1849 are contained, substantially in sections 1919–1922 of said Code.

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election of president, treasurer and officers, subscribing to shares in the common enterprise, come fairly within the meaning of the language of this latter act, whatever was their intention in the first instance as to forming a corporation. If, however, there is any doubt as to whether the act of 1851 applied to a commercial association or partnership organized as the defendants, such doubt can no longer exist, in view of the provisions of section 1919 of the Code of Civil Procedure, which in terms extends to all such organizations, as unincorporated associations within the meaning of that section. The effect of these statutes is to give to joint stock companies and all other unincorporated associations, certain of the attributes and features of corporations, and while they are not indeed corporations to the full extent of all the rights and privileges of corporation the legislature has conferred upon them a distinct legal personality, and to that extent they have the quality of corporations. In this characteristic, the association of the defendants differs from a simple partnership. One of the main substantial reasons why one partner cannot sue another is that a firm of copartners has no legal personality distinct from that of its members; but in the case of associations coming within the meaning of the statutes, such legal personality exists distinct from its members, and they are authorized to sue and be sued in the manner and form provided in the statute.

[*] In view of the evident purpose of convenience in the form of action against the officers of such association contemplated by the legislature in the passage of these acts, and of the general and comprehensive language used, and the absence of limitations, it would seem that a member of such an association stands in no different category from a third party in regard to his right to sue by the name of the president.

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[*] In Waterbury *v.* Merchant's Union Express Company (50 *Barb.* 158), it was held that in controversies between a shareholder as such and against a joint stock company to which he belongs, that the court must follow the analogies of the law of corporations rather than those of a simple partnership. In Westcott *v.* Fargo (61 *N. Y.* 542), it was held that [*] a stockholder might sue a joint stock company of which he was a member, in the form provided by the statutes,—*i. e.*, against the president as such. It seems to me that the reasoning and ruling in Westcott *v.* Fargo applies equally to all associations and partnerships comprehended within the provisions of section 1919 of the Code of Civil Procedure. Same doctrine has been held as to an incorporated association in Strebe *v.* Albert (1 *City Ct.* 376). McMahon *v.* Rauhr (47 *N. Y.* 67) was an action where members of a voluntary [*] association sued others, members of the association, and in the manner the statute provided, and the court held that they must seek their remedy in equity. This decision was before the provisions of section 1919 of the Code of Civil Procedure went into effect. In the light of the decision in Westcott *v.* Fargo, *supra*, and of recent legislation, it would seem to be no longer controlling. It can hardly be supposed, after all this legislation conferring corporate powers upon asso- [*] ciations of the character of the joint stock companies and other voluntary unincorporated associations, that when a member had a cause of action against such an association that resort should still be had to an accounting and dissolution of the association as in the case of an ordinary copartnership. I am of opinion, therefore, that under the provisions of these various statutes, as interpreted by the courts in the cases cited, an action may be maintained by an associate against the association for an indebtedness due to him.

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Motion for non-suit must be denied.

Subsequently, the referee found upon the issues for the plaintiff, and judgment was entered in his favor and against the defendant for $1,201.67 damages and costs, from which the defendant duly appealed.

Ashbel B. Fitch, for defendant, appellant.

The plaintiff cannot recover in this form of action. . . . . It is a well settled general rule, that one partner cannot bring an action against his associates in a court of law. This is largely owing to the technical rule, that he cannot be plaintiff and defendant in the same action. The rule goes even further, and does not allow him to sue his associates in a case where the damages sought to be obtained belong solely to himself, provided they would have to be paid out of a fund to which the plaintiff must himself contribute (*Lindley on Partnership*, 728, 729, and cases there cited). The remedy in all such cases is an action in equity, in which an account can be taken, and the interests of the respective partners be ascertained and adjusted. No associate of an unincorporated association has an interest in the property or effects of the association, which can be separated and taken out of the whole for his sole use, until the joint affairs are settled, the association dissolved, the mutual rights of the members ascertained, and the ultimate share of each member determined (McMahon *v.* Rauhr, 47 *N. Y.* 67).

James A. Seaman (*Seaman & Conger*, attorneys), for plaintiff, respondent.

Cited, as to right of plaintiff to use bill of particulars to refresh his memory: Bigelow *v.* Hall, 91 *N. Y.* 145; McCormick *v.* Penn. Cent. R. R. Co., 49 *Id.* 315; Marcly *v.* Shults, 29 *Id.* 346; Guy *v.* Mead, 22 *Id.* 463; Huff *v.* Bennett, 6 *Id.* 337.

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DALY, Ch. J.—The conclusion of the referee was correct that, since the passage of the acts of 1849, chap. 258, and 1851, chap. 448, any unincorporated association [*] having a president or a treasurer may be sued by a member of the association in an action against either of these officers. Such an association being in the nature of a copartnership, an action at law, before the passage of these statutes, had to be brought against all the members collectively, as such a body had no legal personality distinct from that of its members; and no single member could sue the body collectively, as no one could be plaintiff and defendant in the same action.

The statutes referred to have removed this difficulty by allowing the action to be brought against the president or the treasurer; and it was consequently held in Westcott *v.* Fargo (61 *N. Y.* 542), that a stockholder [*] of a joint stock corporation could sue the company in the form prescribed by the act of 1849. That statute allowed an action against a joint stock company or association consisting of more than seven shareholders to be brought against the president or treasurer of the company, and the act of 1851 extended the provisions of the former act to any company or association of not less than seven members who were the owners of or had an interest in any property, right of action or demand, jointly or in common, or who may be liable to any action on account of such ownership or interest; and if, as has been held, a stockholder of a joint stock company can sue the company in an action against the president or treasurer, under the act of 1849, I do not see why a member of any company or association under the act of 1851 cannot sue the association by bringing the action against one of these officers; for an action in that form is allowed by the act of 1851 against the company or association, if it is an owner or has any interest in any property, right of

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action or demand, the remedy being manifestly limited to what it owns as a body collectively.

["] None of the objections to the evidence were well taken. The witness had the right to use the bill of particulars to refresh his memory as to particular items, each of which, he testified, he recollected, apart from the paper, and the allowing of the question objected to at folio 300 was entirely in the discretion of the referee.*

["] In the finding of fact, the referee allowed the plaintiff $835.35 for money laid out and expended for the association.

At a meeting of the stockholders, a resolution was passed that the plaintiff should have the right to pay petty expenses out of the money taken in at the park in amounts not exceeding $25, to relieve him from the trouble of constantly calling upon the treasurer for such small sums; but that all bills over $25, were to be sent to and paid by the treasurer, and the $835.35 included payments by the plaintiff upon several occasions of amounts greater than $25.

The president testified that this meeting was held when the association took possession of the park, on the 1st or the 2d day of May, but the plaintiff swore that it was held on June 11, and fixed the day by the date of a bill, which he paid upon that day immediately after the meeting. He testified that before the passage of the resolution on that day, no limit had

*The question at folio 300 referred to a bill for soda claimed to have been paid by the plaintiff for defendant, and about which the plaintiff had been examined at length; it was addressed to the plaintiff by his counsel, and the question and objection were as follows:

"Q. Give your best remembrance now in regard to the amount of that soda-water bill?

"Objected to, on the ground that the subject is exhausted. Objection overruled. Exception."

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been placed upon his expenditure by the directors; that he was employed as the manager of the park about a week before the opening of it, on May 1; and that the payments he made were for work that he was ordered by the officers to have done to get the park ready, or payments made for supplies or other matters essential to the carrying on of the enterprise—such as $75 for a license.

The referee evidently believed the plaintiff as to the time, June 11, when this resolution was passed, limiting his expenditures to sums not exceeding $25 in any one payment, or within any one week; and we cannot say that the referee erred, for the testimony of the defendant's witnesses do not agree as to the time when this resolution was passed. One agrees with the president, two leave it uncertain, and one agrees with the plaintiff. Kruger, the vice-president, remembered that it was passed, but was not sure at what meeting. Rothermell testified that it was at the second meeting after the park was opened—which was held, he said, about the middle of June, thus corroborating the plaintiff as to the time of the meeting.

All that Gillig could testify to was that it was passed at a meeting immediately after they took possession of the park, but could not remember when it was held. He thought that he acted as secretary of the meeting, but was not certain, and finally said that he was not positive whether the meeting was held in May or June.

Strassburger, the treasurer, could not tell at what place nor where it was held, except that he believed that it was just after the association started, and was sure that it was before the park was opened, in this respect contradicting the rest of the defendant's witnesses. He also said that the sum limited was $20 and not $25.

This statement is sufficient to show that the time

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when this resolution was passed was a question ["] for the referee; and the materiality of the time of its passage is this—that if it was passed on the 11th of June, as the plaintiff testified, then none of the payments after that date included in the $835.35 were in sums as great as $25, except one of a bill for advertising to one Siebert of $41, which the plaintiff paid, as he testified, immediately after the resolution was passed. He testified that he called the attention of the president and of Kruger, the vice-president, the latter of whom was a member of the house committee —"the rulers of the park," as the president called them; that Mr. Siebert had been waiting throughout the meeting to get the bill paid, and that they told him to pay it; that he replied, "You have just passed a resolution for me not to pay; and I don't want to do it." Upon which they both said, "Go on and pay him," and the treasurer being present, the plaintiff then filled up a check and passed it to Siebert across the table; all of which, being done in the presence of the treasurer, may be regarded as done with his acquiescence; that it was in effect equivalent to a payment ordered by him, and as such, within the intent of the resolution. All the other payments, as appeared by the exhibits and the plaintiff's testimony, which were made after the 11th of June, were made in sums less than $25; so that what the plaintiff recovered was his monthly salary, $100, and $835.45 expenditures, made by him by direction of the officers, before the 11th of June, when he was under no restriction; and expenditures made by and paid for by him in sums less than $25 after the 11th of June.

The judgment should be affirmed.

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POSSON, RESPONDENT, *v.* DEAN, APPELLANT.

COUNTY COURT, ORLEANS COUNTY, APRIL, 1885.

§§ 2231, 2240, 2249.

Summary Proceedings—Petition and proof in, to recover possession of real property for non-payment of rent—Judgment.

Where, in summary proceedings to recover the possession of real property from a tenant for non-payment of rent, the petition alleged that three days' notice in writing requiring the payment of the rent or delivery of the property had been given,—*Held*, that the petition was insufficient if it did not allege that the notice was served by delivering a copy and showing the original.

Where, in such a case, the answer denied that any notice had been served, the petitioner must show that a proper service of the notice has been made.

In summary proceedings to dispossess a tenant for non-payment of rent, a justice has no power to render any judgment except to award to the petitioner the delivery of the possession of the property and the costs of the proceedings; but where he does in such a proceeding award damages, the error is not fatal but may be corrected on appeal.

(*Decided April*, 1885.)

Appeal from a judgment of a justice of the peace in summary proceedings.

The opinion states sufficient facts.

Hunt & Whedon, for defendant-appellant.

Edward Posson, petitioner and respondent, in person.

SIGNOR, County Judge.—Appeal from judgment entered by JOHN ALLEN, Justice, December 26, 1884, in

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favor of the plaintiff and against defendant for damages and costs $9.05, and awarding to the petitioner the delivery of the property described in the petition. The petition shows that the petitioner is the agent of one Samuel Freeman, and that Freeman owned the property described; that he rented the same through an agent to defendant, and that there was rent due and unpaid; and also states: "And your petitioner further shows that he has caused at least three days' notice in writing to be duly served upon the said Michael Dean, on December 12, 1884, as appears by the affidavit hereto annexed requiring in the alternative the payment of the rent or possession of the premises;" and that he holds over without permission, &c. The affidavit of service attached to the petition is: "I served a notice of which the within is a copy on Michael Dean on December 12, 1884, at 4.45 o'clock in the afternoon in the said town, by delivering the same personally to said Michael Dean."

From the return of the justice, it does not appear that any proof was made of the service of the notice on the trial. The notice and proof of service are attached to the petition, which is marked Ex. A. The evidence is marked Ex. E. The answer is a general denial except as to the agency and ownership alleged in the petition.

Section 2231 of the Code provides that the tenant must have been served with the notice, "as prescribed in this title for the service of a precept." Section 2240 provides that a precept must be served "by delivering to the person to whom it is directed . . . . a copy of the precept and at the same time showing him the original."

These proceedings are statutory and must be in conformance to the provisions of the Code (Miner *v.* Burling, 32 *Barb.* 540). The service must be made in the mode prescribed by law (People *ex rel.* Morgan *v.*

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Kettletas, 12 *Hun*, 67). The service evidently was not made as prescribed by the statute, but was made by delivering the original.

The service of the notice, if properly made, should have been proven on the trial, as that is as much a part of plaintiff's case as the ownership of the property or the fact that rent is due. He may be removed only when a notice has been served. The petition must show that a proper service has been made; but the proof by the person making the service need not be made until the trial, and then must be made by competent evidence, as any other fact must be proved. Had there been no appearance, the petition would not have been sufficient; and when defendant appeared and denied that any notice had been served, the plaintiff was bound to prove it.

The justice erred in giving judgment for damages as he had no power to render any judgment except to award to the petitioner the delivery of the possession of the property and the costs of the proceedings (Code § 2249); and in addition it appears that no demand for damages was made in the petition. The justice discovered his error after the entry of judgment, but of course could not change it.

This error, however, would not be fatal, as this court could correct the judgment on appeal; but for the other errors specified, the case must be reversed, with costs.

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BATES, RESPONDENT, *v.* GORMAN, APPELLANT.

COUNTY COURT, ORLEANS COUNTY, MAY, 1885.

§ 3064.

Justice's court—Appeal from judgment by default—Facts necessary to be shown.

Upon appeal from a judgment of a justice of the peace taken by default, the appellant must render a satisfactory excuse for his default, and show *facts* from which it will appear that manifest injustice has been done.[2,3,6]

In such a case, an affidavit that the appellant forgot the time the summons was returnable, and setting forth that he was in charge of a large number of men and with them was engaged in loading a quantity of stone upon canal-boats and upon railroad cars, and that, in the hurry attendant upon the work, he forgot the hour, shows a sufficient excuse for the default;[1,2] but the fact that manifest injustice has been done is not sufficiently proven by an affidavit "that manifest injustice was done to this deponent (the appellant), in this, that said judgment ought not to have been for more than $37.63 with costs, instead of the sum of $200 and costs, as it now stands;" [3,4,5,6] the affidavit contains only an allegation of two conclusions, and does not allege any facts from which either conclusion can be drawn, and is, therefore, insufficient.[7]

(*Decided May* 6, 1885.)

Appeal from a judgment of a justice of the peace rendered on defendant's default.

The opinion states the facts.

Frederick T. Downs, for defendant-appellant.

E. L. Pitts, for plaintiff-respondent.

SIGNOR, Co. Judge.—Appeal from a judgment rendered by JOHN ALLEN, Esq., a justice of the peace of the town of Ridgeway, against the defendant and in favor of the plaintiff for $200 damages and $1.70 costs.

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The judgment was rendered on default of the defendant, who appeals and seeks to excuse his default, and asks for a new trial under section 3064 of the Code of Civil Procedure. The appellant shows by affi-
[*] davit that he forgot the time at which the summons was returnable, and sets forth, as the reason therefor, that he was in charge of a large number of men, and with them was engaged on loading a quantity of stone upon canal-boats and upon railroad cars, and, in the hurry attendant upon the work, he forgot the hour.

I am aware that there are some cases holding that the mere allegation that a defendant forgot the
[*] hour is not enough; but in this case he goes further, and shows, not only that he forgot the hour, but what was the cause of his forgetting, and, I think, so far as this branch of the case is concerned, he shows grounds sufficient to warrant his relief from his default, provided the other fact is established which the Code requires,—viz: that it is shown that manifest injustice has been done. To establish this the appel-
lant, in his affidavit, says, "And deponent says
[*] that manifest injustice has been done to him by the rendition of said judgment; and he alleges that the judgment was rendered upon a claim made by the plaintiff for stone sold and delivered to this defendant; that by such judgment manifest injustice was done to this deponent in this, that said judgment ought not to have been for more than $37.63, with costs, instead of the sum of $200, and costs, as it now stands." This is the only allegation on that subject. The plaintiff, in a counter-affidavit, alleges that the defendant owed him the full amount for which judgment was rendered, and states the items on which the indebtedness arose. It is a general rule of pleading that facts, not conclusions, must be stated. In this case, as where an application for a warrant of arrest, or for an attachment, is

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[*] made, the affidavit should show, not the conclusions necessary to warrant the order, but the facts from which the court, not the deponent, may determine that the conclusions exist.

It is said in, 3 *Wait's Law and Practice*, 80, and in 4 *Wait's Practice*, 477, where appeals of this nature are very fully considered: "In drawing the affidavits of the defendant it will not be sufficient to rely upon the mere statement or allegation that injustice has been done. The statute requires that it shall be shown that manifest injustice has been done." From the language used, it is evident that it was intended that injustice must be shown in a proper manner by legal proof, which in such a case may be by affidavit showing the facts and circumstances from which it may be legally inferred that injustice has been done.

It was held in Armstrong *v.* Craig (18 *Barb.* 387), that an affidavit of merits was not enough to warrant the granting of a new trial. That was in effect swearing that no judgment should have been rendered, as the defendant had a good defense to the whole claim on the merits. The allegation that manifest injus-
[*] tice has been done is an allegation of a conclusion, not an allegation of facts, and is of itself insufficient.

The only remaining question is whether the allegation that the judgment should not have been for more $37.63 is sufficient. There is no reason given why the judgment should have been for a less amount—whether by reason of inferior quality of materials, a failure to furnish as much as claimed, a partial payment, a set off, or counter-claims. Neither is it shown that defendant has any defense that can be established on a new trial. The appellate court cannot, from the affidavits, see in any manner why the judgment should be for any smaller sum than that for which it was rendered, and which, upon the proofs in the case, was warranted.

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There must not only be injustice done, but it must
[*] be *manifest*—made plain that such is the case. It may not only be stated, but it must be *shown*. The allegation in the affidavit amounts at most to a denial of indebtedness, but does not in any other way dispute any of the facts sworn to on the trial and reiterated in the plaintiff's affidavit used on this appeal; it amounts at most to only the denial of a conclusion of law, and would be insufficient as a denial in an answer (Gilbert *v.* Covell, 16 *How. Pr.* 34; Fosdick *v.* Groff, 22 *Id.* 158).

[*] The affidavit contains only an allegation of two conclusions, and does not allege any facts from which either conclusion can be drawn, and is therefore insufficient to show that manifest injustice has been done; and for that reason the judgment must be affirmed, with costs.

THOMPSON, Respondent, *v.* WHITMARSH, Appellant.

Court of Appeals, October, 1885.

§§ 449, 1814.

Executor.—When action by must be brought in representative capacity.—Debt due from decedent, when not a proper counter-claim in action by executor.

In an action by an executor or administrator to recover the purchase price of property belonging to the estate sold by him on credit, he is, as an individual, the real party in interest; the debt does not belong to him in his representative capacity within the meaning of section 1814 of the Code of Civil Procedure,—which provides that an action by "an executor or administrator upon a cause of action belonging to him in his representative capacity . . . . must be

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brought by . . . . him in his representative capacity,"—and the defendant cannot use as a counter-claim an unpaid note made by the plaintiff's decedent and held by him; it must be paid in the ordinary course of administration, and cannot gain any preference, as it is entitled to none.

Thompson v. Whitmarsh (16 *N. Y. Weekly Dig.* 283), affirmed. (*Decided October* 6, 1885.)

Appeal by defendant from a judgment of the general term of the supreme court, third department, affirming a judgment in favor of the plaintiff entered upon the report of a referee.

Reported below, 16 *N. Y. Weekly Dig.* 283.

The action was brought by the plaintiff, who was the sole executor and legatee under the will of her husband, who died insolvent, to recover the price of certain personal property owned by the decedent in his lifetime, and which the plaintiff has sold to the defendant on credit. This property consisted chiefly of cows which had been purchased by the decedent from the defendant, and for which he had given his note. A part of that note remained unpaid, and the defendant claimed the right to set it off against the claim on which the action was brought. The referee before whom the case was tried disallowed the set-off and ordered judgment in favor of the plaintiff for the amount of her claim. The defendant appealed to the general term from the judgment entered on the referee's report, and thereafter, upon its being affirmed by that court, took this appeal.

A. P. Smith, for defendant-appellant.

Franklin Pierce, for plaintiff-respondent.

FINCH, J.—It is not denied in this case that, irrespective of sections 449 and 1814 of the Code, and before its enactment, an executor or administrator,

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seeking to enforce a contract made by himself and not by the decedent, could sue in his own name; and that in such action a demand against the decedent belonging to the defendant could not be used as a counter-claim to diminish or extinguish the recovery. It is insisted, however, that the effect of these sections is to change the law, and compel the executor or administrator to sue in his representative capacity where his recovery will be assets, and is for the benefit of the estate.

Under section 449 every action must be brought by the real party in interest, and where the recovery is wholly for the benefit of the estate, it is said such real party in interest is the executor or administrator, and not the individual who happens to be charged with the trust duties. And this contention is claimed to be strengthened by the language of section 1814, that "an action or special proceeding hereafter commenced by an executor or administrator upon a cause of action belonging to him in his representative capacity. . . . . must be brought by . . . . . him in his representative capacity." Here the plaintiff is executrix, and sold upon credit, property of the estate to the defendant, who holds an unpaid note of the decedent. The estate is insolvent, and if the defentant can use his demand as a counter-claim, he alone of all the creditors can secure a preference out of the assets, and be paid in full at the expense of others equally entitled to payment. The result would overturn the whole system of distribution to creditors, and compel executors and administrators never to sell on credit at public auction where creditors of the deceased could buy, or in some unexplained way exclude them from the list of purchasers. No such construction of the Code is permissible.

Where an executor or administrator sells on credit the property of the estate, and sues to recover the debt,

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he, as an individual, is the real party in interest, for the contract was made with him, and the promise to pay runs to him, and he is personally accountable for the assets which he has sold. For the same reason, the debt does not belong to him in his representative capacity, within the intent and meaning of the section of the Code referred to. That phrase relates to debts which belonged to the testator or intestate, and came to the executor or administrator through his representation of the deceased rather than as the result of his own action. The effect of the section and the change produced by it, is upon the class of cases in which the action could have been maintained in either form; as where, upon a contract made with the testator, the cause of action accrued after his death; or where, upon a debt or obligation due to the deceased, the executor or administrator has taken a new security or evidence of debt. In these cases, before the Code, the action might be in the individual or representative name, but now must be in the latter. Upon new contracts made by the executor or administrator, and never existing in favor of the decedent, but growing out of the contracts and dealing of the former alone, the action is properly brought in the name of the individual, and a debt against the decedent cannot be made the subject of a counter-claim. It must be paid in the ordinary course of administration, and can gain no preference, as it is entitled to none.

This particular ground of objection appears not to have been taken at the general term, and so was not considered in the opinion there rendered, which sufficiently answered the other grounds urged in support of the appeal.

The judgment should be affirmed, with costs.

All concurred.

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GRAEFFE *v.* CURRIE AND ANOTHER.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM, JULY, 1885.

§§ 549, 550, 1487.

Arrest.—Instance of case in which right to depended on facts extrinsic to the cause of action.

Where in an action to recover money deposited with the defendants while acting as brokers for the plaintiff, there was nothing alleged in the complaint to show that the plaintiff was entitled to recover the identical money deposited, and there was no allegation that it had been converted,—*Held*, that the cause action was one in which the right to arrest the defendants, if it existed, depended upon facts extrinsic to the cause of action ;[1,4] and therefore the plaintiff was not authorized to issue an execution against the person of the defendant, unless an order of arrest had been granted and executed in the action ;[4] that the parties were simply debtor and creditor;[1] and the fact that the money was deposited and allowed to remain and accumulate upon an agreement that the defendants should honestly and faithfully act as brokers in the purchase and sale of grain as the plaintiff would from time to time give them directions in respect thereto, and would report to the plaintiff honestly and faithfully the prices at which purchases were made or sales had, according to the custom of brokers, did not change the relation between them ;[2] that allegations in the complaint of fraud in not honestly and faithfully investing the plaintiff's money, and in reporting false and fraudulent transactions, did not bring the action within subdivision 4 of section 549 of the Code of Civil Procedure,—which provides for arrest "in an action upon contract . . . . where the defendant was guilty of a fraud in contracting the liability."[3]

(*Decided July* 30, 1885).

Motion by defendants that an execution issued against their person be set aside.

The plaintiff brought this action to recover from the defendants, who were grain brokers, the sum of

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$3,875 and interest, being $3,456.25, deposited by him with the defendants, and $418.75 credited to plaintiff by defendants on October 13, 1884, as the net profits of investments made by defendants for plaintiff.

The third paragraph of the complaint alleged "that said moneys were so deposited, allowed to remain and accumulate in defendants' hands upon the agreement made between the plaintiff and the defendants that the defendants should honestly and faithfully act as brokers for the plaintiff in the purchase and sale of grain, as the plaintiff would from time to time give them directions in respect thereto, and would report to the plaintiff honestly and faithfully the prices at which purchases were made or sales had, according to the custom of brokers."

The complaint also averred that the defendants did not honestly and faithfully invest said moneys, but reported from time to time certain false and fraudulent transactions, which they reported to the plaintiff to be honest and fair; that the plaintiff, relying upon and believing such representations, permitted the use of said moneys, and as the result the defendants reported the loss of all said money save $459.99; that immediately upon the discovery that the statements made were false and fraudulent, plaintiff repudiated the said transactions and demanded the return of the money deposited; and that the defendants, although they promised to return the same, had neglected so to do, and had returned or paid to the plaintiff the sum of $390 only.

The action was tried before a jury, and a verdict directed in favor of the plaintiff; the exceptions ordered to be heard in the first instance at general term, and judgment suspended in the meantime. Thereafter the defendants waived the exceptions and consented that judgment be entered for the amount of the verdict, and judgment was thereupon entered for

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$3,569 damages and $337.77 costs. An execution against the property was subsequently issued on the judgment; it being returned unsatisfied, the execution against the person of the defendants which they now move to set aside was issued.

Jesse K. Furlong and *George F. Duysters*, for defendants and motion.

Alexander Thain, for plaintiff, opposed.

INGRAHAM, J. —The complaint alleges that on September 8, the plaintiff had on deposit with defendants the sum of $456.25; that at various times between that date and October 18, 1884, plaintiff deposited with the defendants various sums of money, aggregating $3,000, and about October 13, 1884, there was credited to plaintiff's account by defendants the sum of $418.25, making in the aggregate the sum of $3,375, moneys of the plaintiff in the hands of the defendants.

[1] This allegation at it stands would make the relation between the plaintiff and the defendants one simply of debtor and creditor; and the fact that the defendants were acting as the brokers of the plaintiff would bring the case within subdivision 3 of section 550 of the Code,—which provided for the cases where the right to arrest depends upon facts extrinsic to the cause of action.

[2] The allegation in the third clause of the complaint, that the said moneys were so deposited and allowed to remain and accumulate in the defendants' hands upon the agreement therein set forth, does not change the relation that existed between the parties. Nothing is alleged that would show that the plaintiff was entitled to recover the identical money that had been deposited with the defendants, and there is no

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allegation in the complaint that the money was converted by the defendants.

To sustain the action it was not necessary to allege in the complaint the relation that existed between the parties, or that the money was received as a broker or in a fiduciary capacity (Wood *v.* Henry, 40 *N. Y.* 126; Segelken *v.* Meyer, 6 *N. Y. Civ. Pro.* 1).

As appears by the case on appeal that was submitted to me on the argument of this motion, on the trial of the action no evidence was offered by the plaintiff to show that the money was paid to, or received by the defendants under any special agreement; but the evidence of the plaintiff was that on a certain day he had a balance with the defendants of so much, and that he gave them various sums in cash, aggregating $3,456.25, the balance being made up by the profits on a wheat speculation. If the action had been one for a conversion of money, the plaintiff failed to make out such a cause of action on the trial, and the complaint would have been dismissed.

[*] The subsequent allegations of fraud in the complaint do not bring the action within subdivision 4 of section 549 of the Code. The liability that the action was brought to enforce was contracted on the original deposit of the money with the defendants. There was no fraud, therefore, in contracting or incurring the liability, and the allegations of fraud in the complaint were in relation to subsequent transactions which the defendants claim resulted in a loss to plaintiff.

[*] I think, therefore, the action is one under subdivision 3 of section 550, where the right to arrest depends upon facts extrinsic to the cause of action, and, under section 1478, plaintiff was not authorized to issue an execution against the person unless the order of arrest had been granted and executed against the judgment debtor. As no order of arrest has been

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granted in this action, the execution was irregular, and must be set aside.

Motion must therefore be granted, with $10 costs.

SMITH, RESPONDENT, *v.* DUFFY, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, OCTOBER, 1885.

§§ 549, 550, 1241, 1487.

Arrest.—In action to annul conveyance fraudulently obtained.—When depends upon subject of cause of action.

Where a judgment setting aside a conveyance also awards costs the proper mode of collecting the costs is by execution.[2]

Jacquin v. Jacquin (7 *N. Y. Civ. Pro.* 327), followed.[2]

An execution may be issued against the person to collect the costs, awarded the plaintiff in a judgment setting aside a conveyance of real property frrudulently obtained from the plaintiff by the defendant, notwithstanding an order of arrest has not been granted or executed in the action.[6,7,8] The right to arrest the defendant depends, in such a case, upon the nature of the action, and is conferred by subdivision 4 of section 550 of the Code of Civil Procedure.[3,6,7,8]

The liability of the defendant in such a case, to arrest, is to be determined exclusively by the Code of Civil Procedure.[1]

The only cases in which the right to arrest a defendant depends upon facts extrinsic to the cause of action within the meaning of section 1487 of the Code of Civil Procedure,—which provides when an execution against the person may be issued,—are those specified in subdivisions 1, 2 of section 550.[4,5] Those contained in section 549 and in subdivisions 3, 4 of section 550, are cases in which the right to arrest necessarily forms a part of the judgment.[3,5]

(*Decided October* 9, 1885).

Appeal by defendant from an order denying a motion to vacate and set aside an execution issued against his person.

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The action was brought to set aside and annul a conveyance of real property fraudulently obtained from the plaintiff by defendant, who was her brother, and was tried at special term. The court found that the plaintiff was the owner of the property in question, and that the conveyance thereof to him was fraudulently obtained, and adjudged it null and void; ordered that it be delivered, by the defendant to the plaintiff, and that the defendant cause it to be vacated and set aside of record, and that he pay the plaintiff the costs and expenses she had been put to in the action. Judgment was thereafter entered against the defendant for the relief so granted and for $349.45 costs and disbursements. No order of arrest was ever granted in the action, but, after the return of an execution against the property of the defendant for the amount of such costs, an execution against his person was issued therefor, which it is now sought to have vacated. It appeared on the motion, by the affidavit of the defendant, that he had "fully complied with the requirements of said judgment in respect to having the deed or assignment of the real estate mentioned therein canceled in the office of the register . . . and delivering the said deed or assignment up to the attorneys for the plaintiff."

William J. Kane, for defendant-appellant.

George F. Langbein (*Langbein Bros. & Langbein*), attorneys, for plaintiff-respondent.

DANIELS, J.—The action was prosecuted to annul and set aside an assignment or conveyance executed by the plaintiff to the defendant. It was alleged to have been fraudulently obtained by him from her, and that it was so obtained was found as a fact by the court before which the trial took place. He was the brother

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of the plaintiff, and presented the paper or conveyance in controversy to her and requested her to sign it, which she did, relying upon their confidential relations for its correctness. In doing so, he took an unconscientious advantage of her, and obtained from her valuable proprietary interests. By the judgment which was recovered, this conveyance or assignment was vacated and annulled for the fraud of the defendant in obtaining the same from the plaintiff, and she was adjudged to recover for the costs of prosecuting the action the sum of $349.45. For the collection of these costs an execution was issued against the property of the defendant and returned unsatisfied, and thereupon an execution was issued against his person, which it was the object of the motion to set aside. The court held the execution against the person to have been lawfully issued and denied the motion, and it is to review this determination that this appeal has been taken by the defendant. In support of it, his counsel has claimed that an execution against his person could not be issued upon the judgment, inasmuch as no order of arrest was ever made or served in the action.

[1] The liability of the defendant to arrest upon the execution is to be determined exclusively by the provisions contained upon the subject in the Code of Civil Procedure. It has been declared by section 548 that a person shall not be arrested in a civil action or special proceeding except as prescribed by statute, and section 1487 has further declared that a judgment can be enforced by execution against the person in but two specified classes of cases. The first is where the plaintiff's right to arrest depends upon the nature of the action, and the second upon the fact of an order of arrest having been granted and executed and not afterwards vacated. That an execution for the

[2] collection of these costs was an appropriate mode of proceeding has been declared by subdivision 2

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of section 1241 of the Code of Civil Procedure, and the point was considered and so held in Jacquin *v.* Jacquin by this general term in a decision not yet reported.* So far as the recovery of costs was provided for by the judgment, the regular mode of carrying it into effect, therefore, was by the process of an execution. But as no order of arrest was obtained in the action, the right of the plaintiff to issue an execution against the person of the defendant must depend upon the point whether the right to arrest him resulted from the judgment itself—and that is to be determined by the preceding sections of the Code declaring the cases in which a defendant may be arrested in a civil action. These cases have been prescribed and defined by sections 549 and 550 of the Code of Civil Procedure. Those contained in the first of these sections are all cases where the right to arrest necessarily forms a part of the judgment. The subject matter of the actions mentioned in the section is that of legal wrongs or [*] misconduct, for the result of which the defendant is liable to arrest. It has been supposed that the present case was included within subdivision 2 of section 549, but as that includes only actions for damages sustained by reason of one of the causes mentioned in the subdivision, and this was not an action of that description, this position cannot be sustained. The term "damages," in the subdivision has evidently been used in its legal sense, as including the compensation a party may be entitled to for the consequences or losses sustained by one or more of the wrongs mentioned in the section. And as no claim for such damages was included in the plaintiff's complaint in this action, it is entirely clear that this subdivision has no application to her right to issue an execution against the person of the defendant. The other subdivisions of

* Reported 7 *N. Y. Civ. Pro.* 327.

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the same section are also clearly inapplicable to the case.

If the execution can be sustained, it must be done therefore, under the authority of section 550, and not of the preceding section. The leading object of section 1487 has been to prevent the arrest of a party where the right to make it has not formed the subject of controversy, and been sustained by the adjudication in the action in which the execution against the person is proposed to be issued. Where the action itself is upon a subject matter directly charging the commission of a wrong by the defendant, and an adjudication to that effect has been made in the action, there the right to arrest the defendant upon an execution against his person will necessarily be sustained under the first subdivision of this section. But where that may not be the nature of the action, and the liability to arrest depends upon extraneous facts or circumstances, there it has been required that an order of arrest shall first be obtained, executed and continued in force against the defendant before he will be liable to an execution upon the judgment against his person.

This is the language and effect of subdivision 2 of [*] this section, and it includes the classes of cases which are contained in subdivisions 1 and 2 of section 550 of the Code. There the misconduct for which the right to arrest has been provided will not form any part of the subject of the action itself, but it is necessarily incidental and in no manner entering into the plaintiff's complaint, and to justify an arrest under these subdivisions, proof by affidavit is required to present this collateral misconduct, and the order obtained upon it is required to be served upon the defendant, and to remain in force at the time when the execution against the person may be issued. But these are the only instances in which this collat-] eral inquiry and adjudication of a wrong are

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required to be made to justify an execution against the person, for the cases provided for in subdivisions 3 and 4 of this section are those where the action itself is necessarily brought upon an allegation of the wrong which it is its design to correct. Each of the subjects included in these two subdivisions is that of a positive and affirmative wrong on the part of the person proceeded against in the action, and its determination, necessarily requires an adjudication as to whether the wrong alleged was or was not committed. Neither of the unlawful acts included within subdivision 3 of this section formed the subject of the plaintiff's complaint in this action, but that included in subdivision 4 of the section was the subject matter for which she claimed redress. Her action was brought to rescind and annul a transfer or conveyance of her property, fraudulently obtained by the defendant; and for a failure to comply with that portion of the judgment directing him to deliver up to the plaintiff's attorneys for her the assignment or conveyance in question, and to cancel, vacate and set aside the registry of it in the register's office, he might be punished for a contempt under the authority of section 1241 of the Code.

From this circumstance, as well as the nature of the allegation contained in the complaint and the facts found by the court, it is clear that the action was included within subdivision 4 of section 550 of the Code, and in that action, if it could have been [*] made to appear that he was not a resident of the State, or, being a resident, was about to depart therefrom, and that there was accordingly danger that the judgment might by that circumstance be rendered ineffectual, he would have been liable to arrest by virtue of an order under section 551 of the Code. But this arrest under such an order would not result from the existence of any incidental or collateral wrong perpetrated by him, but from the necessity

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alone of securing his presence within the jurisdiction of the court for the enforcement of any judgment recovered in the action. The nature or subject matter of the action would be unaffected by such an incidental proceeding. Its gist would still remain the sole wrong charged against the defendant, for which, upon proof establishing its existence, the plaintiff would be entitled to the redress finally awarded to her by the judgment. The wrong, and not the incidental question whether there was danger of the defendant's departure from the State, would continue to be the subject matter of the litigation. That was the controlling issuable fact, without establishing which the plaintiff would have no ground of action and could recover no judgment against the defendant, but by establishing it the rights claimed by her would necessarily be determined, as they have been in this action, in her favor. Her right, therefore, to proceed against the [*] defendant's person did depend upon the nature of her action, and not upon the incidental inquiry whether he was or was not about to depart from the State. That was a collateral subject, having nothing to do with the merits of the controversy. They were of a different character, charging the defendant with the commission of a positive wrong. There evidently could be no actionable wrong attributed to his design to leave the State, and if he entertained it, it was not the purpose of this provision of the Code to render him subject to arrest by final process upon the judgment because of that circumstance. The wrong consisted in his fraudulently obtaining from the plaintiff, who is his sister, this assignment or conveyance of her property, and it was to render her legal redress as certain as the law could make it for this wrong, that this incidental arrest during the pendency of the action was provided. In this respect, the arrest was distinguishable from that provided for by subdivisions

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1 and 2 of this section of the Code, for there the arrest would be the direct consequence of the wrong, not itself forming a part of the subject matter of the action. While in this case, the wrong was the exclusive subject matter of the suit, and the object of the arrest under an order would be the detention of the defendant until judgment could be recovered and enforced against him according to the effect of the adjudication which should be made upon the wrong alleged as the foundation of the suit, and that did not present a case in which the right of the plaintiff to arrest the defendant depended upon the nature of the action. If it did not, then the absurdity would follow that in the same class of cases a defendant, not a resident, or about to depart from the State, and prevented from doing so by an order of arrest, might be regularly arrested under an execution against his person; while a defendant actuated by no such interest or expectation would not be liable to arrest upon such an execution, upon precisely the same allegations and adjudication; and that could not have been the design of any part of this subdivision of section 550 of the Code.

What is intended by the proceedings provided for was to secure complete and adequate means of redress for the wrong forming the subject of the suit, and a prominent part of those means would be the punishment of the defendant by way of imprisonment for his failure or refusal to comply with the directions contained in the judgment, and it is to be supposed, where a proceeding of this extreme character can be maintained against the party, that it was designed to relieve his person from arrest by execution on that part of the judgment which included the recovery of the costs. But, on the other hand, as the sole subject matter of the action was the defendant's wrongful act, and that was necessarily adjudicated against him by the judgment, it was the design of the law to provide

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for the arrest of his person by means of an execution under subdivision 1 of section 1487 of the Code. To construe it otherwise would be needlessly to restrain and limit the language which has been made use of, for it has in the most general manner provided for the defendant's arrest upon execution where the nature of the action itself is such as to adjudge him to have been guilty of a wrong forming the exclusive foundation of the plaintiff's right to redress.

[*] What these provisions of the Code were designed to accomplish was that a party should be relieved from liability for arrest in all cases of contract, unless it might be the case of a promise to marry, where the contract had not been fraudulently entered into, or the liability had not in that manner been incurred, and the defendant had not implicated himself in any wrongful act in the way of an attempt or endeavor to cheat or defraud his creditors, and in other cases where actual or intentional wrong had been perpetrated and made the subject matter of the action, so as to be necessarily adjudicated against the party by the judgment, to provide for enforcing the judgment by the proper process for that purpose against his person if it could not be satisfied out of his property. That has been the general aim and policy of the law, and it is not to be supposed, in view of the careful provisions which have been made upon this subject, that the legislature intended to relieve a person who had fraudulently deprived another of his or her property from liability for final arrest after that fact had been necessarily determined against him by the final decision of the action. But the purpose of the law has been, where the fact has been so adjudicated, to render him liable for final arrest, for the reason that the nature of the action itself, and its necessary determination, must exclusively establish the fact that he has been guilty of a wrong for which the plaintiff

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should be secured by this mode of redress. The execution in this case was justified by the authority of subdivision 4 of section 550 of the Code. It was an action where the nature of the subject was that of a legal wrong, for the complete redress of which, and the collection of the expenses necessarily incurred in prosecuting the suit, the plaintiff has become entitled to proceed against the defendant's person. The order in the case was warranted by these provisions of the law, and it should be affirmed, with the usual costs and disbursements.

DAVIS, P. J., and BRADY, J., concurred.

MACE *v.* SCOTT, ET AL.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, NOVEMBER, 1885.

§ 471.

Infant.—Appointment of guardian ad litem for non-resident defendant.

A guardian *ad litem* for an infant defendant, whether he be under or over the age of fourteen years, may be appointed by the court on the application of the plaintiff in the action, where the infant being a non-resident of the State has been duly served by publication, and it appears that he has no general or testamentary guardian or guardian *ad litem*, and that he has not appeared in the action:

Ingersoll *v* Mangam (84 *N. Y.* 622) distinguished.

(*Decided November* 5, 1885.)

Application by plaintiff for the appointment of a guardian *ad litem* for four infant defendants.

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The infants for whom the plaintiff sought to have guardians *ad litem* appointed resided at Irvington, N. J., with their parents, and had been duly served with the summons in the action by publication. Three of them were over and one less than fourteen years of age, and none of them had any general or testamentary guardian or guardian *ad litem*, or had appeared in the action.

LAWRENCE, J.—It was held by the court of appeals in Ingersoll *v.* Mangam (84 *N. Y.* 622), that to constitute a personal service of a summons upon a defendant who is an infant under the age of fourteen, there must be a delivery of a copy of the summons within the State, both to the infant and his father, mother, guardian or other person specified in section 426 of the Code of Civil Procedure, and that service on the infant alone or upon one of the persons specified was not sufficient. It was also held that a guardian *ad litem* can only be regularly appointed for such a defendant after service of the summons personally or by the substituted mode of service prescribed, and that, therefore, when an infant resided in New Jersey and the summons was not served upon him either personally or by publication, but was personally served upon his mother in this State, who, after such service, upon her own application was appointed guardian *ad litem* of the infant, the court had no jurisdiction to make such appointment, as the action had not been commenced against him, and that the judgment was not binding upon him, and that the purchaser at a sale thereunder could not be compelled to complete his purchase. In this case, the infants were duly served by publication, and three of them are of the age of fourteen years and upwards, the remaining infant being of the age of twelve years. All the infants reside with their father at Irvington, in the State of New Jersey. It is alleged that no gen-

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eral or testamentary guardian or guardian *ad litem* has been appointed for either of them.

Section 473 of the Code of Civil Procedure does not cover this case, because that section relates to the case of an infant defendant, who resides within the State and is temporarily absent therefrom. Section 116 of the old Code of Procedure, for which section 473 of the Code of Civil Procedure is a substitute, contained a provision allowing the plaintiff to apply to the court in a case of an infant defendant residing out of the State for an order designating some suitable person to be the guardian for the infant defendant for the purposes of the action, unless such infant, or some one in his behalf, within a number of days after service of a copy of the order, &c., shall procure the appointment of a guardian for said infant. That portion of section 116 has not been retained in section 473 of the present Code, nor does it appear in sections 470 and 471, which, according to the notes of Mr. Throop, were partially taken from section 116 of the old Code.

But I think that this application can be granted under section 471 of Code of Civil Procedure. That section provides that an infant defendant must also appear by guardian, who must be a competent and responsible person, appointed upon the application of the infant, if he is of the age of fourteen years or upwards and applies within twenty days after personal service of the summons, or after service thereof is complete, as prescribed in section 441 of this act, or, if he is under that age or neglects so to apply, upon the application of any other party to the action or of a relative or friend of the infant. Section 471, however, contains no provision as to the notice to be given in cases of applications for the appointment of guardians *ad litem* of an infant who has neither a general nor testamentary guardian, and who does not reside within this State; the provision of section 116 of the

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old Code having, as before stated, been omitted from the present Code. But as the court has obtained the jurisdiction by the service of the infants by publication, I think that under section 471, as the infants have not appeared, the plaintiff has a right to make this application, and that the court can prescribe—the defendants being in default—what, if any, notice should be given to the infants of such application, and that, therefore, the order applied for should be granted.

COWDREY AND ANOTHER, *v.* EICHINGER AND ANOTHER.

SUPREME COURT, SECOND DEPARTMENT, KINGS COUNTY, SPECIAL TERM, AUGUST, 1885.

§ 1873.

Judgment creditor's action—Instance of case in which sale of real property not decreed.

Where a judgment debtor conveyed real property, through mesne conveyances, to his wife, for the purpose of defrauding his creditors, and a judgment creditor's action was brought against him and his wife to set aside such conveyance, in which a *lis pendens* was filed, but the publication of the summons—the defendants being non-residents—was not commenced until after the lapse of more than sixty days thereafter, and the debtor's wife, after the commencement of such publication, but before her appearance in the action, conveyed the property to a third person, and judgment was subsequently rendered in the action, setting aside the conveyance, and erroneously directing a sale of the property by a referee,—*Held*, that a motion made after the expiration of ten years after the docketing of the judgment on which the judgment creditor's action was founded, that the judgment in such action be amemded so as to direct a conveyance to a receiver and a sale by him, should be denied.

(*Decided August* 24, 1885.)

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Motion by plaintiff in judgment creditor's action to amend judgment by changing provisions for a sale of certain real property by a referee, to a direction to convey the same to a receiver to be appointed for the purpose of selling, etc.

This action was brought by the plaintiffs as assignees of a judgment recovered by one M. H. Brush in June, 1874, for $613, against George Eichinger, to set aside as fraudulent a transfer of certain real property owned by said Eichinger, made by him on June 26, 1871, through mesne conveyances to his wife Margaret Eichinger, who is a party-defendant in this action, and demanded judgment herein that the premises be sold under the direction of the court and the plaintiff's judgment be satisfied out of the same; besides the costs a *lis pendens* and the complaint herein were filed on October 10, 1874, and the defendants being both non-residents of the State, an order for the service of the summons by publication was granted December 9, 1874. The first publication of the summons under such order was made December 6, 1874—more than sixty days after the filing of the complaint and *lis pendens*—and the defendants appeared in February, 1875, and answered. On December 24, 1874, the defendant Margaret Eichinger sold and conveyed the premises in question by a deed duly recorded in Kings county to one Martin Ibert, who afterwards conveyed the same to one J. O. Buchmann. Neither Ibert nor Buchmann were made parties to this action.

In May, 1875, the action was tried before Mr. Justice PRATT, who found in favor of the plaintiff, and on the 20th of that month rendered judgment directing a sale of the premises in suit, by a referee.

On August 17, 1885, the plaintiff made this motion upon affidavits. It appeared that the judgment re-

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covered by M. H. Brush, upon which this action was founded, was docketed in Kings county June 5, 1874.

S. F. & F. H. Cowdrey, plaintiffs in person, for the motion, cited Dawley *v.* Brown, 65 *Barb.* 107.

Wm. F. Pitshke, for defendants, opposed.

I. The *lis pendens* expired before appearance of the defendants, because the first publication of summons was not made within sixty days from the filing of the *lis pendens* (§ 132, *Code of Pro.*; § 1670, *Code of Pro.*). Thereby, the *lis pendens* was rendered of no avail. Only a proper judgment could operate as a new *lis pendens*, under Holbrook *v.* N. J. Zinc Co., 57 *N. Y.* 617.

II. The earliest legal commencement of this action occurred in February, 1875, by, the "*appearance*" of defendants, made *equivalent* to a personal service of the summons (*Code of Pro.* § 139); for this action was only commenced when the "service of summons" occurred (§ 99, *Code of Pro.*) or its "*equivalent.*" Then, the title to the premises was already out of both defendants.

III. Ibert is not bound herein, but took a superior title. Hall *v.* Nelson, 23 *Barb.* 88; Gray *v.* Schenck, 4 *N. Y.* 460.

IV. The *lien* of plaintiff's "money-judgment" created by its docket on June 5, 1874 (to enforce which, plaintiffs brought this action against the premises so as to have the obstructing conveyances shifted and the property *sold*), has, by efflux of more than *ten* years, wholly *expired*,—this action being "based" on such expired lien of plaintiffs' deficiency-judgment. Plaintiffs' said specific "*judgment-lien*" was necessary to *exist*, to allow plaintiffs to proceed to a *sale* in a "judgment-creditor's action." Crippen *v.* Hudson,

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13 *N. Y.* 161, 166; also, Tufts *v.* Tufts, 18 *Wend.* 621.

V. No "lien" on the property now existing, none would attach to the proceeds from a receiver's sale, the proceeds remaining "real estate" as before. Dunning *v.* Ocean N. B'k, 61 *N. Y.* 497 503. On the contrary, the receiver would *take*, *subject* to the conveyances subsequent to the issuance of the summons herein. Chautauqua Co. B'k *v.* Risley, 19 *N. Y.* 370, 374. The motion is too late.

BARNARD, P. J.—Motion *denied* with ten dollars costs, it appearing that the lien on the premises of plaintiffs' former judgment, sued on herein and set forth that in the complaint, heretofore expired and that paintiffs' notice of *lis pendens*, filed with respect to this action, lapsed before commencement of the publication of the summons herein and before either defendant appeared; and the said premises being no longer held by either defendant.

ESTATE OF FENN, DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY, MARCH, 1885.

§§ 2474, 2530, 2531.

Special guardian of infant in proceedings for sale of decedent's real estate—Effect of failure to give notice of application for appointment of, on title.—Jurisdiction, when acquired.

In a proceeding for the sale of real property for the payment of a decedent's debts, the surrogate obtains jurisdiction of infants interested in the property when they are served with a citation issued

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upon a petition setting forth the jurisdictional facts prescribed by statute. [2]

Where a petition for the sale of a decedent's real property for the payment of his debts was duly presented and all parties interested, including certain infants, were regularly cited, and the decree directing the sale and the order confirming it and directing its execution were properly made; the failure to give notice of application for the appointment of a special guardian for such infants, as required by section 2531 of the Code of Civil Procedure is not such error, omission or defect as would affect the title of a purchaser of the property at the sale, and excuse him from taking title. [3]

Varian v. Stevens (2 *Duer*, 635) followed. [4]

It seems, that where, in a proceeding to procure the sale of a decedent's real estate, for the payment of his debts, no person applies, on the return day of the citation for the appointment of a special guardian of infants interested therein, the surrogate should appoint one on his own motion. [5]

(*Decided March* 19, 1885.)

Motion to compel purchasers at sale of real property for the payment of the debts of a decedent, to take title.

Wm. Reynolds Brown and *C. R. Waterbury*, for the motion.

Frederick Smyth, for purchasers, opposed.

ROLLINS, S.—In the course of proceedings looking to the disposition of this decendent's real property for the payment of his debts, certain of such property has been sold pursuant to a decree of the Surrogate. The purchasers refuse to take title upon the ground that five infants, interested in the estate, have not been properly represented in the proceedings. These infants are severally under the age of fourteen years and reside within the State of New York. Each of them was duly served with a citation and before the hearing of the application for the sale of the property in question there was appointed for each a special guar-

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dian, who seems to have properly protected the interests committed to his care.

It is claimed in behalf of the purchasers (no persons else joining in the contention) that the order appointing the special guardian of these infants is of no effect, inasmuch as his appointment was in each instance made upon the application of a person other than the infant (to wit, the father of the infant) without personal service upon the infant of a notice that such application would be made.

Section 2531 of the Code of Civil Procedure declares that "where a person other than the infant applies for the appointment of a special guardian, at least eight days' notice of the application must be personally served upon the infant if he is within the State, in like manner as a citation is required by law to be served."

Does the fact that the notice, for which that section provides, was not given in the case at bar, afford a sufficient excuse to these objectors for refusing to accept title to the premises that they have purchased?

Section 2530 of the Code declares, that "where an infant does not appear by his general guardian . . . the Surrogate must appoint a competent and responsible person to appear as special guardian."

Neither that section nor any other statutory provision limits the authority of the Surrogate in making such appointment to cases in which an application for such appointment has been previously made, or declares who shall be premitted to present such an application, or indicates whether the application should be general in its character, asking simply for the appointment of some competent and responsible person or particular, asking for the selection of some designated individual. Nor does the statue book throw any light upon the question, whether, in case of such an application as I have styled "particular" the Surrogate would be bound to appoint the person specified, in the

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event that such person should not seem to be incompetent or irresponsible.

[*] Surrogate COFFIN of Westchester County *held*, in Matter of Ludlow (5 *Redf.* 391) that on the return day of the citation issued in a proceeding to which infants are parties, if no person had applied for the appointment of a special guardian for such infants, the Surrogate should appoint of his own motion.

Such has been the constant practice in this county, a practice that seems very sensible and proper; one that would not have been open to criticism before the Code was enacted, and is not in conflict with any of the provisions of that instrument.

The Surrogate is powerless to compel the making of an application for the appointment of a special guardian, and, unless in the absence of such application he can lawfully appoint, a proceeding in which an infant is a party must come to a standstill, or must be prosecuted to the end without any binding effect upon such infant.

If, therefore, the respective fathers of the several infant parties in the case at bar had not asked for the appointment of a special guardian, and if the Surrogate, *ex mero motu*, had appointed the very person who has, in fact, guarded the interests of these infants, I think that his action in that regard would have been strictly regular.

It is, however, the better practice to insert in citations to infants a clause advising them, that, in the event of their not appearing by general guardian, and of their failing to ask for the appointment of a special guardian, a special guardian will, upon the return of the citation, be appointed by the Surrogate.

By this means the infants have the same notice of the purpose of the Surrogate to *make* the appointment as by section 2521, they are required to have of the

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purpose of some party to the proceeding to *apply* for such appointment.

Now, in the present case there has doubtless been an irregularity in the neglect to give these infants, by citation or otherwise, the notice for which section 2531 provides.

But does that irregularity so vitiate these proceedings as to impair the title which these objectors could take to the property purchased, and to relieve them accordingly from fulfilling their contract?

[*] The Surrogate obtained jurisdiction of these infants when they were served with the citation issued upon a petition that set forth the jurisdictional facts prescribed by the statute (section 2474 *Code of Civil Procedure;* Matter of Becker, 28 *Hun*, 207; Sibley *v.* Waffle, 16 *N. Y.* 185; McMurray *v.* McMurray, 66 *Id.* 177; Ingersoll *v.* Mangam, 84 *Id.* 622).*

Now, section 2784 of the Code declares that the title of a purchaser in good faith at a sale pursuant to a decree made in a proceeding like the present "is not . . . . in any way affected by any of the following omissions, errors, defects or irregularities; except so far as the same would affect the title of a purchaser at a sale made pursuant to the directions contained in a judgment rendered by the Supreme Court in an action:

"1. Where a petition was presented, and the proper persons were duly cited, and a decree for a sale, and an order directing the execution thereof were made, . . . by any omission, error, defect or irregularity occurring between the return of the citation and the making of the decree or order directing the execution of the decree."

[*] The petition herein was duly presented, the

* Service upon the infant is necessary to jurisdiction; service upon his general guardian is not sufficient. Pinckney *v.* Smith, 26 *Hun*, 524.

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infants as well as the other parties were regularly cited, and the decree directing the sale and the order confirming the sale, and directing the execution of the same were properly entered. Under these circumstances I hold that the error, omission or defect complained of, is not of such a character that it would, in an action in the Supreme Court, affect the title of a purchaser of property at a sale made pursuant to the judgment in such action (Alvord *v.* Beach, 5 *Abb. Pr.* 451; Gaskin *v.* Anderson, 7 *Abb. Pr. N. S.* 7; Herbert *v.* Smith, 6 *Lans.* 493; De Forest *v.* Farley, 62 *N. Y.* 628; Darvin *v.* Hatfield, 4 *Sand.* 468; Holden *v.* Sackett, 12 *Abb. Pr.* 475; Blakeley *v.* Calder, 15 *N. Y.* 621; Jordon *v.* Van Epps, 19 *Hun*, 533; Coit *v.* McReynolds, 2 *Robt.* 655; Graham *v.* Bleakie, 2 *Daly*, 55; Matter of Dolan, 88 *N. Y.* 349; Silleck *v.* Heydrick, 2 *Abb. N. S.* 57; Matter of Luce, 17 *Weekly Digest*, 35; Minor *v.* Betts, 7 *Paige*, 597).

In the case last cited, approvingly referred to in Varian *v.* Stevens (2 *Duer*, 635), Chancellor WADSWORTH decided a question that arose under chap. 227 of the Laws of 1833.

[*] That act provided, that upon the filing of a bill for the partition of lands, if any of the defendants should be minors, it would, under certain circumstances, become the duty of the Court to appoint a guardian for such minors, without exacting security, "provided, however, that a copy of the said petition and notice in writing, signed by the solicitor of the complainants, specifying the time and place, when and were the said petition will be presented, shall be served at least ten days before the presentation of such petition upon the general guardian or minor or minors, in case there be such guardian, *or upon the minor, if there be none.*"

The act drew no distinction between resident and non-resident infants in its requirements respecting

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service of notice, though in the particular case in which the question of its construction arose, the infants lived out of the State. The Chancellor directed that the general notice to appear and answer having been duly published, the appointment of guardian *ad litem* might be made at once without further notice to the infants.

In view of the decisions above cited, I hold that in the case at bar the neglect to give the infant parties notice of the application for the appointment of their special guardians does not excuse these objectors from taking title.

PRESIDENT, ETC., OF THE BANK OF MOBILE, *v.* THE PHŒNIX INSURANCE COMPANY.

SUPREME COURT, NEW YORK COUNTY SPECIAL TERM, DECEMBER, 1883.

§§ 3251, 3253, 3256.

Allowances—How many, by court in same case—Costs before and after notice of trial where there has been more than one trial—Costs on commission—Witnesses' fees.

The prevailing party in an action in which the court may grant an additional allowance, can not have more than one such allowance.

Where an action has been twice tried, the successful party is not entitled to tax the costs before and after notice of trial twice, they are not properly costs of the second trial.

A deposition or commission and the interrogatories upon it, taken before trial for use on the trial, can be charged for but once, and the fact that it was used on two or three trials of the actions, does not entitle the prevailing to tax costs therefor two or three times.

Fees paid to witnesses, who were actually subpœnaed on the second trial of a cause should be allowed the prevailing party on the adjustment of his costs.

(*Decided December* 23, 1883.)

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Motion for a new taxation of costs

On the first trial of this action, which was brought to recover on a policy of insurance a loss by fire therein insured against, judgment was rendered in favor of the plaintiff, and an allowance of five per cent. on the sum recovered was granted the plaintiff amounting to $296.25. Costs before and after trial were taxed, also $20 for taking two depositions *de bene esse* and $20 for drawing two sets of interrogatories on a commission on appeal, a new trial was directed, and on that the plaintiff was again successful, and an allowence of five per cent. on the recovery, amounting to $346.50 was granted. The plaintiff sought to tax the allowances granted on both trials, and also to tax the costs for depositions *de bene esse*, and for drawing interrogatories. He also sought to tax five terms fees in the general term and five in the trial term.

Other facts are stated in the opinion.

Butler, Stillman & Hubbard, for the motion.

John R. Dos Passos, opposed.

LAWRENCE, J.—I think the clerk was right in refusing to tax the allowance upon the first trial. I find no warrant for the proposition that the prevailing party is entitled to two allowances in the same case. If it were otherwise, a party who had been four times successful at the Circuit, in cases in which new trials had been granted by the General Term, might, upon ultimately succeeding, obtain as an allowance twenty per cent. upon the amount of his recovery, in the face of the provision in the statute limiting such amount to five per cent. Nor do I think that the cases referred to by the learned counsel for the plaintiff sustain him in the position that he is entitled to tax the costs before and after notice of trial twice in the same

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action. They are not properly costs of the second trial, and having been once allowed as costs of the first trial, the clerk was right in striking them out as costs upon the second trial. If the depositions and interrogatories charged for in the second bill of costs were allowed in the first bill, the clerk was right in refusing to tax them a second time. The statue does not contemplate that a deposition once taken and charged for should be paid for the second or third time, because that deposition is read on a second or third trial of the action. The same remark applies to the interrogatories upon the commission. If the witnesses were actually subpœnaed upon the second trial, and their fees paid, the clerk should have allowed the item for witnesses' fees. I cannot determine from the papers before me why the item was disallowed. I see no reason for disturbing the taxation of the clerk in regard to the term fees, and in all other respects the taxation seems to me to be right.

NOTE ON ADDITIONAL ALLOWANCES.

In general—Damages for delay in the court of appeals—Allowance by statute—Allowance by the court.

In General. The making of additional or extra allowances, in civil actions, is governed by the Code of Civil Procedure (§§ 3251, subd. 6, last paragraph, 3252, 3253, 3254, 3262), and the court, *it seems*, has no power to grant an extra allowance other than that provided for by the Code, in any case in which costs are fixed by chapter XXI. See Downing *v.* Marshall, 37 *N. Y.* 380.

The power of a court of equity to grant counsel fee out of a fund belonging in common to the parties to an action is not however affected by these provisions. Hotaling *v.* Marsh, 14 *Abb. Pr.* 161; rev'g 18 *Id.* 297, *note.*

It appears from an examination of the provisions of the Code of Civil Procedure on this subject, that there are three distinct kinds or classes of allowances, viz.: (1) Damages for delay in the court of appeals, (2) Allowances by statute, and (3) Allowances by the court. These three kinds or classes will be considered separately.

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DAMAGES FOR DELAY IN THE COURT OF APPEALS.

The only provisions of the Code of Civil Procedure on this subject are to be found in the last paragraph of the sixth subdivision of section 3251, which reads as follows:

"Where a judgment is affirmed by the court of appeals, the court may, in its discretion, also award damages, by way of costs, for the delay, not exceeding ten per centum upon the amount of the judgment; or, where it was rendered upon an appeal, upon the amount of the original judgment."

The corresponding provision of the Code of Procedure (added to section 307 by Laws of 1858, chap. 306, § 11, subd. 6), was that "When a judgment is affirmed, the court (*i. e.*, the court of appeals), may, in its discretion, also award damages for the delay, not exceeding ten per cent. on the amount of the judgment."

In Day *v.* Roth (18 *N. Y.* 448) five per cent. damages for delay were allowed by the court of appeals, the case being a peculiar one, in which it appeared that the defendants had conspired to defraud the plaintiff out of certain moneys received by one of the defendants in trust for her.

In Maher *v.* Carman (38 *N. Y.* 25) the court of appeals granted an allowance of ten per cent., damages, for delay, it being evident that the appeal was taken solely for delay.

In Warner *v.* Lessler (38 *N. Y.* 296), it was held that where the answer contained but a general denial, and the appellant on the appeal neither submitted any points, nor pointed out any error in the proceeding below, that a penalty of ten per cent. should be imposed.

In Adams *v.* Perkins (25 *How. Pr.* 368), where the court of appeals affirmed a judgment of the general term, affirming a judgment of the special term in favor of the defendant, for $193.25 costs, and granting him $54.80 costs of appeal,—*Held*, that the allowance made by the court of appeals (ten per cent.) should be computed upon the amount of both judgments. This does not now seem to be the rule. *Vide*, sub'd 6 of section 3251, Code of Civil Procedure, quoted *supra*.

Where the remittitur from the court of appeals gave the prevailing party interest on the amount of the judgment below "by way of damages for the delay and vexation caused by the appeal," it was *held*, that the remittitur was not appropriate for an assessment of damages, and that only the interest which is allowed on all judgments could be taxed. Hoard *v.* Garner, 4 *Sandf.* 677.

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Note on Additional Allowances.

Allowances by Statute.

In General. Under the Code, as originally enacted in 1848, extra allowances were in the discretion of the court, and there were not any extra allowances "by statute" as that term is now understood. In 1857, by an amendment to section 308 of the Code of Procedure (Laws of 1857, chap. 723, § 14), provision was made for allowances by statute substantially the same as those now in force, except that until 1862 the plaintiff was entitled to an allowance only on the recovery of final judgment, and could not have one where the action was settled before judgment (Bostwick *v.* Tioga R. R. Co., 17 *How. Pr.* 456; Wilkinson *v.* Tiffany, 4 *Abb. Pr.* 98, but see, *contra*, Gelpeck *v.* Leather Cloth Co., 12 *Abb. Pr.* 361, *note*), this deficiency was supplied by Laws of 1862, chapter 428, amending section 308 of the old Code. As thus amended, that section remained in force unchanged until the adoption of section 3252 of the Code of Civil Procedure in 1880, when, by chapter 245, Laws of 1880, it was repealed.

When made. There are five classes of actions in which the plaintiff, upon the recovery of a final judgment in his favor, if he recovers costs, or where the action is settled before judgment, is entitled, under section 3252 of the present Code, to an allowance, to wit:

1. An action to foreclose a mortgage on real property.
2. For the partition of real property.
3. To procure an adjudication upon a will or other instrument in writing.
4. To compel the determination of a claim to real property.
5. In which a warrant of attachment against property has been issued.

The plaintiff only is entitled to an allowance under section 3252 of the Code of Civil Procedure (*Code of Civil Procedure*, § 3252; Williams *v.* Hernon, 13 *Abb. Pr.* 297); his right thereto is definite and absolute, and not subject to the discretion of the court (Hunt *v.* Middlebrook, 14 *How. Pr.* 300; Williams *v.* Hernon, 13 *Id.* 297), and it is not necessary that he should make any motion in order to obtain it (Hunt *v.* Middlebrook, *supra*); but the clerk should, upon the adjustment of costs, insert in the bill the amount to which the party is entitled. Hunt *v.* Middlebrook, *supra*; Williams *v.* Hernon, *supra*; *Code of Civil Procedure*, § 3262.

In action to compel determination of claim to real property.

The old Code granted an allowance in "proceedings to compel the determination of claims to real estate," and it was held that it referred

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only to the special proceedings for that purpose authorized by 2 *R. S.* 312 (Bridges *v.* Miller, 2 *Duer*, 683). Those provisions of the Revised Statutes were repealed by Laws of 1880, chap. 245, and sections 1638–1650 of the Code of Civil Procedure, providing for actions to compel the determination of a claim to real property were substituted. It is evidently solely to an action under these sections that section 3253 of the present Code refers, when it provides for an allowance in an action, to compel the determination of a claim to real property.

Where attachment issued.

In every action commenced by attachment, the plaintiff was, under the old Code, entitled to an allowance "by statute" (Woodward *v.* Grier, 2 *Code R.* 13), and that, although no property had been attached (Jackson *v.* Figaniere, 15 *How. Pr.* 224); but it was held that where the warrant of attachment was issued as a provisional remedy and subsequently set aside, there could be no such allowance. Iselin *v.* Graydon, 26 *How. Pr.* 95.

The Code of Civil Procedure (§ 3253), provides that the allowance, where it depends upon the issuing of a warrant of attachment, shall be estimated "upon the value of the property attached, not exceeding the sum recovered or claimed," and as there would be no means of computing an allowance, where property has not been attached, it necessarily follows that there cannot now be any allowance "by statute" unless there has been a levy under the attachment. See Fetchman *v.* Davenport, *post*, p. 220.

Tender.—A tender in an action to foreclose a mortgage under 2 *R. S.* 553, § 20, which provides that "When any action at law shall be commenced for the recovery of a sum certain, or which may be reduced to certainty by calculation, or for a casual or involuntary trespass or injury, the defendants, in any stage of proceedings, before trial in such causes, or before such damages shall have been assessed, or before judgment rendered in an action of debt, may tender to the plaintiff or his attorney any sum of money which such defendant shall conceive sufficient amends for the injury done, for which such action or proceedings was instituted, or sufficient to pay the plaintiff's demands, together with the cost of such action or proceeding, to the time of making such tender," was held, under the Code of Procedure, not to preclude the recovery of an allowance "by statute" by the plaintiff, as the action was an equitable one, and the statute applied only to common law actions. N. Y. Fire & Marine Ins. Co. *v.* Burrill, 9 *How. Pr.* 398; and see Conn. River Banking Co. *v.* Voorhies, 3 *Abb. Pr.* 173; Pratt *v.* Ramsdell, 7 *Id.* 340, *note*; S. C., 16 *How. Pr.* 59.

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Note on Additional Allowances.

Section 731 of the present Code, which took the place of that provision of the Revised Statutes, substitutes the words "Where the complaint demands judgment for a sum of money only; and the action is brought to recover a sum certain," for the phrase, "When any action at law shall be commenced for the recovery of a sum certain." While, therefore, the present statute on the subject is not expressly limited in its application to common law actions, as it applies only where judgment is demanded for a sum of money only, it cannot, it seems, apply to an action to foreclose a mortgage, or indeed to any equitable action. Sections 1634 and 1635 of the Code of Civil Procedure provides for the payment into court of the amount due on a mortgage in certain cases, and it would seem, where payment was made under either of such sections, the party entitled to costs would be entitled to an allowance "by statute." This question has not, however, been passed upon by the courts.

Section 385 of the Code of Procedure, providing for the making of offers of judgment, which has been re-enacted in section 738 of the Code of Civil Procedure, without substantial change, was held in Bathgate *v.* Haskin (63 *N. Y.* 261, rev'g 5 *Daly*, 361), to apply to actions for the foreclosure of a mortgage where a personal judgment for deficiency was asked, and it would seem that where such an offer was made and accepted, the plaintiff would be entitled to an allowance "by statute" at the half rate, it being a settlement.

Cases in which there is no allowance by statute.

The following have been held to be cases not within the provisions of the Code, and in which the plaintiff was not, upon the recovery of judgment, entitled to an allowance "by statute."

An action brought by the people to test the title of defendants to lands under royal grants. People *v.* Clarke, 11 *Barb.* 337; aff'd 9 *N. Y.* 349.

An action brought solely to restrain another action. Spring *v.* Snyder, 6 *How. Pr.* 11; S. C., 1 *Code R. N. S.* 178; Powers *v.* Wolcott, 12 *How. Pr.* 565.

An action to enjoin a defendant from selling to others manufactured articles which he had contracted to sell solely to the plaintiff although the chief contest was as to the validity and construction of the agreement. Gray *v.* Robjohn, 4 *Bosw.* 618.

An action for the specific performance of a contract to sell real property. Spring *v.* Snyder, 6 *How. Pr.* 11; S. C., 1 *Code R. N. S.* 178; Weeks *v.* Southwick, 12 *How. Pr.* 170, and see Osborne *v.* Betts, 8 *Id.* 31.

An action to restrain foreclosure of mortgage on real property. Spring *v.* Snyder, 6 *How. Pr.* 11; S. C., 1 *Code R. N. S.* 178.

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Note on Additional Allowances.

Amount. The amount of an allowance "by statute" is "to be estimated upon the amount found to be due upon the mortgage; or the value of the property partitioned, affected by the adjudication upon the will or other instrument, or the claim to which is determined, or the value of the property attached not exceeding the sum recovered or claimed, as the case may be," and consists of percentages at the following rates:

"Upon a sum not exceeding $200, ten per centum.

"Upon an additional sum, not exceeding $400, five per centum.

"Upon an additional sum, not exceeding $1,000, two per centum." *Code of Civil Procedure*, § 3252.

The maximum amount of such an allowance is $60. Where the action "is settled before judgment, the plaintiff is entitled to a percentage upon the amount paid or secured upon the settlement, at one-half those rates." *Code of Civil Procedure*, § 3252.

Before provision was made for an allowance by statute in case of settlement before trial, it was held that the court might require the payment of an allowance as a condition of discontinuing the action (Barton *v.* Cleveland, 7 *Abb. Pr.* 339; S. C., 16 *How. Pr.* 364; Pratt *v.* Ramsdell, 7 *Abb. Pr.* 340, *note;* S. C., 16 *How. Pr.* 59), and that where the plaintiffs, in an action in which a warrant of attachment had been issued, agreed to discontinue upon payment of their attorney's costs, the costs to be paid included a full allowance. Brown *v.* Safeguard Ins. Co., 7 *Abb. Pr.* 345.

There can be only one allowance "by statute," although there may be an interlocutory and a final judgment,—*e. g.*, in partition. Bremer *v.* Bremer, 11 *Hun*, 147; aff'd without opinion *sub nom.* Bremer *v.* Penniman, 72 *N. Y.* 603.

To entitle a plaintiff to a full allowance under section 3252 of the Code of Civil Procedure, judgment must have been entered, and where the action is settled before that is done, the allowance can be only at half rates. Bryon *v.* Durrie, *Super. Ct., Gen. Term*, 6 *Abb. N. C.* 135.

"In an action to foreclose a mortgage upon real property, where a part of the mortgage debt is not due, if the final judgment directs the sale of the whole property, as prescribed in section 1637" of the Code of Civil Procedure, "the percentages specified . . . must be computed upon the whole sum, unpaid upon the mortgage. But, if it directs the sale of a part only, as prescribed in section 1636" of the said Code, "they must be computed upon the sum actually due; and if the court thereafter grants an order directing the sale of the remainder, or a part thereof, the percentages must be computed upon the amount then due; but the aggregate of the percentages shall not

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exceed the sum, which would have been allowed if the entire sum secured by the mortgage had been due when final judgment was rendered." *Code of Civil Procedure*, § 3252.

Allowances by statute "must be computed by the clerk upon taxation; but the value of property, required to be ascertained for that purpose, must be ascertained by the court, unless it has been fixed by the decision or report, or by the verdict of the jury, upon which the final judgment is entered; except that, in case of actual partition, it must be determined by the commissioners." *Code of Civil Procedure*, § 3262.

The following case bears upon and construes this provision, and also that part of section 3252 relating to allowances in cases in which attachments have been issued.

FETCHMAN *v.* DAVENPORT.

CITY COURT OF NEW YORK, SPECIAL TERM, APRIL, 1885.

§§ 3252, 3262.

Attachment—Basis on which extra allowance computed.

In an action in which the plaintiff, having been successful, is entitled to an allowance "by statute," the amount of the recovery is not the value of the property attached within the meaning of section 3252 of the Code of Civil Procedure.

In such a case, in the absence of a return, where the sheriff has not made a return of the writ with the customary appraisal of value, the plaintiff should prove by affidavit or otherwise the value of the property attached, that the clerk may have a basis upon which to compute the allowance.

(*Decided April* 23, 1885.)

Motion for a new taxation of costs.

An attachment was issued and levied in the action, and the plaintiff having recovered judgment therein sought to tax, in his bill of costs, an allowance "by statute" under section 3252 of the Code of Civil Procedure. The clerk allowed his claim thereto and computed it upon the amount of the verdict. The defendant thereupon made this motion.

HAWES, J.—The Code seems to be very clear as to the right of the plaintiff to an additional allowance, and the basis upon which it is to be computed. Section 3252 provides that, in an action where a warrant of attachment has been issued, the percentage is to be estimated upon the value of the property attached, not exceeding the sum recovered or claimed. It is clear that the amount of the judgment is not the value of the property attached, as the limiting clause would in such a case be meaningless. Neither is the warrant of

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attachment such proof. In this instance the only evidence of value is the extract from the minutes showing the amount of recovery, and a percentage upon this amount was allowed. The taxation is clearly erroneous. If the sheriff had made a return of the writ with the customary appraisal of value, I think that that would have been sufficient; but it was not presented and was not before the clerk, and the computation was not made upon that basis. In its absence the plaintiff, I think, should establish, by affidavit or otherwise, the value of the property attached. A retaxation is ordered when the necessary proof can be supplied.

In Brace *v.* Beatty (5 *Abb. Pr.* 224; rev'd because party not entitled to allowance, 7 *Id.* 445), where an attachment was issued and more property than the amount which the plaintiff was entitled to recover was levied upon, it was *held*, that the allowance must be computed on the amount which he should recover and not on the value of the property. Section 3252 of the present Code expressly provides that the allowance shall be "upon the value of the property attached not exceeding the sum recovered or claimed."

ALLOWANCES BY THE COURT.

Authority is given the court to make allowances in certain cases to any party by section 3253 of the Code of Civil Procedure which is as follows:

"In an action brought to foreclose a mortgage on real property; or for the partition of real property; or in a difficult and extraordinary case, where a defense has been interposed, in any action; the court may also, in its discretion, award to any party a further sum, as follows:

"1. In an action to foreclose a mortgage, a sum not exceeding two and one-half per centum upon the sum due or claimed to be due upon the mortgage, nor the aggregate sum of two hundred dollars.

"2. In any other case, specified in this section, a sum not exceeding five per centum upon the sum recovered, or claimed, or the value of the subject matter involved."

The provisions of the Code of Procedure on the subject of allowances by the court, as originally enacted, bore little resemblance to this section of the present Code (See Code of 1848, §§ 263, 264). Where the Code was re-enacted in 1849 (Laws of 1849, chap. 438) these provisions (§§ 308, 309, of the Code as amended by those laws) were not changed, and they remained unchanged until 1857, when, by Laws of 1857, chap. 723, § 14, sections 308 and 309 were remodeled; allowances "by statute first provided for, and the law made in many respects similar to that now in force. The section providing for

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allowances by the court (§ 308) was amended in 1858 by chapter 306; of the laws of that year, in 1859 by chapter 428, in 1862 by chapter 460, § 19, in 1865 by chapter 615, § 8, and in 1870 by chapter 741, § 12, at which latter time, so far as it related to such allowances, it was practically, with one exception,—*i. e.*, the limit placed on allowances in an action for the foreclosure of a mortgage,—the same as the section of the Code of Civil Procedure quoted above. Thus it continued without further change, except the addition of a provision similar to that contained in section 3254 of the present Code (quoted below under "amount") by Laws of 1876, chap. 431, until it was repealed by the Laws of 1880, chap. 245.

In digesting the decisions on this subject as far as possible those which are rendered inapplicable to the present Code by reason of any peculiar provisions of the Code of Procedure under which they were made, will be omitted.

Cases in which Granted. It appears by an examination of section 3253 of the Code of Civil Procedure that the court may grant an allowance in three classes of cases, viz:

1. In an action brought to foreclose a mortgage upon real property.

2. In an action for the partition of real property; and

3. In a difficult and extraordinary case, where a defense has been interposed.

There can be but one extra allowance under this section to any one party, although the cause may have been tried several times (Union Trust Co. *v.* Whiton, 17 *Hun*, 593, appeal dismissed; S. C., 78 *N. Y.* 491; Flynn *v.* Equitable Life Ass. Soc., 18 *Hun*, 212; De Stuckle *v.* Tehuantepec R'y Co., 3 *N. Y. Civ. Pro.* 411; President of Bank of Mobile *v.* Phœnix Ins. Co., *ante*, p. 212); allowances may be granted to several parties, but the aggregate allowances made to all the parties on one side cannot exceed one allowance at the full rate nor the limit of $2,000 fixed by section 3254 of the Code of Civil Procedure. Weed *v.* Paine, 4 *N. Y. Civ. Pro.* 305; and see Allis *v.* Wheeler, 56 *N. Y.* 50.

The granting of a new trial or setting aside of the verdict renders ineffectual an order making an allowance (Hicks *v.* Waltermire, 7 *How. Pr.* 370; Sleight *v.* Hancox, 4 *Abb. Pr.* 245), and in one case in the New York superior court (McQuade *v.* N. Y. & Erie R. R. Co., 11 *How. Pr.* 434), it was *held*, that where a new trial was granted upon payment of costs, an extra allowance was not to be deemed a part of such costs.

Although the statute reads "to any party," *it seems* that the allowance can be made only to the successful party or parties by way

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of indemnity for the expense incurred by him or them in the litigation (Burke *v.* Candee, 68 *Barb.* 552; Murray *v.* Robinson, 9 *Hun*, 137); and cannot be made to an unsuccessful party, even though his opponent recovers only nominal damages. Murray *v.* Robinson, *supra.*

In Brady *v.* Durbrow (2 *E. D. Smith*, 78), it was *held*, that a defendant who recovered costs because the plaintiff recovered less than $50, may, if the case is difficult and extraordinary, have an extra allowance.

DIFFICULT AND EXTRAORDINARY CASES. The allowance may be granted to any party in a difficult and extraordinary case (*Code of Civil Procedure*, § 3253) and whether the action be legal or equitable in its nature or partly legal and partly equitable. Davis *v.* Glean, 14 *How. Pr.* 310.

Prior to the amendment of the Code of Procedure by Laws of 1865, chapter 615, an allowance could be granted by the court in difficult and extraordinary cases, only where a trial had been had (*Code of Procedure* § 309 as amended by Laws of 1857, chap. 723, § 14) but now allowances may be granted in such cases if a defense has been interposed (Vide, *Code of Civil Procedure* § 3253, quoted *supra;* Mills *v.* Watson, 45 *N. Y. Super. Ct.* [13 *J. & S.*] 591; Coates *v.* Goddard, 84 *Id.* [2 *J. & S.*] 118; Coffin *v.* Coke, 4 *Hun*, 618), and it seems a demurrer is such a defense. N. Y. Elevated R. R. Co. *v.* Harold, 80 *Hun*, 466.

There can be no allowance, however, in such cases where an answer or defense is not interposed. *Id.;* Krum *v.* Steele, 7 *N. Y. Weekly Dig.* 472.

On discontinuance.

In Moulton *v.* Beecher (11 *Hun*, 192), it was *held*, that where the plaintiff discontinues an action after putting in an amended complaint and before the defendant's answer thereto is served, the defendant might have an extra allowance although there was no issue at the time of the discontinuance, an issue having been joined in the cause by the answer to the original complaint, and that the plaintiff could not prevent an extra allowance to the defendant by tendering the amount of his costs as noticed for taxation. To same effect, Robins *v.* Gould, 1 *Abb. N. C.* 133.

The payment of an extra allowance by the plaintiff, to his attorney, may be required as a condition of the discontinuance of the action where it has been settled without the intervention of the attorney. Bryon *v.* Durrie, 6 *Abb. N. C.* 135, and see Barton *v.* Cleveland, 7 *Abb. Pr.* 339; S. C., 16 *How. Pr.* 364; Pratt *v.* Remsdell, 7 *Abb. Pr.* 340, *note;* S. C., 16 *How. Pr.* 59.

An extra allowance may be imposed as a condition of allowing a

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discontinuance, even where there is an objection to the jurisdiction. Bright *v.* Milwaukee & St. Paul Railway Co., 1 *Abb. N. C.* 14 (*Supr. Ct. Sp. T.*); Robins *v.* Gould, 1 *Abb. N. C.* 133 (*Supr. Ct. Sp. T.*); Bryon *v.* Durrie, 6 *Abb. N. C.* 135 (*Supreme Ct. Gen. T.*).

In Newton *v.* Newton (*Supreme Ct. N. Y. Co. Spec. T., Decided October* 26, 1885), which was an action brought by a wife for a separation from her husband, the following decision was filed by LAWRENCE, J.—Although I have the power to impose an allowance upon the plaintiff as a condition, on the discontinuance of this action, yet as the case relates to matrimonial difficulties, I do not think that I ought to subject the wife to unnecessary costs (Coffin *v.* Coke, 4 *Hun*, 616). An order will, therefore, be entered that this case be discontinued upon payment of the costs of the action.

Where the parties agreed to discontinue an action upon payment of costs by one to the other, costs were held to include an allowance. Brown *v.* Safeguard Ins. Co., 7 *Abb. Pr.* 245.

An extra allowance can be granted where an order was made, permitted the plaintiff to discontinue on payment of costs "to be adjusted by the clerk." Society of N. Y. Hospital *v.* Coe, 15 *Hun*, 440, Supreme Ct., Gen'l Term, opinion by POTTER, J., INGALLS, P. J., dissenting.

Determining whether case is difficult and extraordinary.

The determination of the question whether a case is difficult and extraordinary rests almost wholly in the discretion of the judge granting the allowance. Downing *v.* Marshall, 37 *N. Y.* 380; Bryon *v.* Durrie, 6 *Abb. Pr.* 135; Morss *v.* Hasbrouck, 13 *N. Y. Weekly Dig.* 393; Hurd *v.* Farmers' Loan & Trust Co., 16 *N. Y. Weekly Dig.* 480.

The court is not required to grant an extra allowance in every case that it may consider difficult and extraordinary; the exercise of the power is discretionary (Hurd *v.* Farmers' Loan & Trust Co., 16 *N. Y. Weekly Dig.* 480), and no general rule governing the granting of allowances on that ground in particular cases can be given; each case must be determined according to its own peculiar circumstances (Sackett *v.* Ball, 4 *How. Pr.* 71; Fox *v.* Gould, 5 *Id.* 278). The case, however, must be both difficult and extraordinary; it must involve something unusual and require more than ordinary care in its preparation and trial. Duncan *v.* Dewitt, 7 *Hun*, 184.

It has been held that a long trial does not of itself constitute such a case (Sands *v.* Sands, 6 *How. Pr.* 453; Dexter *v.* Gardner, 1 *Code R. N. S.* 80; S. C., 5 *How. Pr.* 417; Howard *v.* Rome & Tunic Plank Road Co., 4 *How. Pr.* 416; S. C., 3 *Code R.* 41; Fox *v.* Fox, 22 *How. Pr.* 453; and see, Woods *v.* Illinois Cent. R. R. Co., 20 *How. Pr.* 285); but that generally the court will be influenced, in determining

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the question, more by the difficulty and intricacy of the questions involved than by the time occupied in the litigation. Sackett *v.* Ball, 4 *How. Pr.* 71.

In Powers *v.* Walcott (12 *How. Pr.* 565), E. D. SMITH, J., construing the words "difficult and extraordinary" said: "These terms must apply to the general character, the nature and extent of the litigation involved in it, the period of its continuance, the trouble of conducting it in respect to witnesses, counsel and parties, their situations and number traveling, and other expenses, the time consumed in the trial and the extent of the litigation afterwards. All these considerations enter into the question whether the suit was such."

Where a case presented a difficult and extraordinary question of law, and the evidence was conflicting, it may be considered a difficult and extraordinary case. Lane *v.* Van Orden, 11 *Abb. N. C.* 228; S. C., 63 *How. Pr.* 237.

The term "difficult and extraordinary" imports something more and other than usual, common and ordinary in respect to the labor and skill required, or in the time occupied in the preparation or trial of the case, or both. Gooding *v.* Brown, 35 *Hun*, 153; citing, Fox *v.* Gould, 5 *How. Pr.* 278; Fox *v.* Fox, 22 *Id.* 469; S. C., 24 *Id.* 385; Duncan *v.* De Witt, 7 *Hun*, 184.

The amount involved may be considered in determining whether or not an additional allowance should be granted, as the fact; its determination affects a large sum, imposes additional care and responsibility on the party and his attorney, and causes increased and unusual expense. Gooding *v.* Brown, 35 *Hun*, 153, 156.

It is not a sufficient reason for allowing a large sum, that prominent counsel from abroad have been retained (Schwartz *v.* Poughkeepsie Mutual Fire Ins. Co., 10 *How. Pr.* 93; Sackett *v.* Ball, 4 *Id.* 71; S. C., 2 *Code R.* 47). The fact that upon the first trial an allowance was denied, is no ground (of itself), for denying it upon a re-trial. Fox *v.* Fox, 24 *How. Pr.* 385.

An extra allowance will be granted to the successful party upon a new trial, which was neither difficult nor extraordinary, when the same party was successful on the first trial, and that was difficult and extraordinary. Howell *v.* Van Siclen, 4 *Abb. N. C.* 1; S. C., less satisfactorily reported, 70 *N. Y.* 595; aff'g 8 *Hun*, 524.

The special term of the supreme court in New York county has held that the fact that the case is a hard one for the defeated party, cannot be considered on an application for an extra allowance (Lane *v.* Van Orden, 63 *How. Pr.* 237; S. C., 11 *Abb. N. C.* 228); but in Losee *v.* Bullard (54 *How. Pr.* 319), the New York superior court, special term, held exactly the contrary, and that an allowance might be

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refused on the ground that the case was an unfortunate one for the defeated party, and in McKeen v. Fish (33 *Hun*, 28), and Hurd v. Farmers' Loan & Trust Co. (16 *N. Y. Weekly Dig.* 480), this latter proposition seems to have been tacitly recognized as controling and adopted.

Among the cases in which allowances sought for on this ground were refused, are the following:

Where judgment was taken after answer for want of an affidavit of merits. Hall v. Parker, 7 *N. Y. Leg. Obs.* 138.

Where judgment was given on frivolous answer. Hale v. Prentice, 1 *Code R.* 81; Beers v. Squire, 1 *Id.* 84; overruling Fowler v. Houston, 1 *Id.* 51; and see Rice v. Wright, 3 *How. Pr.* 405.

Where, in an ordinary case, the trial occupied two or three hours, and the questions involved were somewhat complicated. Dexter v. Gardner, 5 *How. Pr.* 417; S. C., 1 *Code R. N. S.* 80.

Where the trial was protracted by the fact that the plaintiff, who succeeded, claimed too much. Sands v. Sands, 6 *How. Pr.* 453.

Where executors failed in an action for dower, brought by their testator and revived in their name, in which she would, upon the facts found, have succeeded if living. McKeen v. Fish, 33 *Hun*, 28.

Where, in an action between partners for an accounting, the action was made difficult and extraordinary, by allegations of bad faith on the part of the defendant, made by the plaintiff who sought an allowance, and subsequently abandoned. Hinman v. Ryder, 44 *N. Y. Super.* 330.

Where, in an action by a receiver to set aside a conveyance, the defendant succeeded largely by reason of the inadequacy of the property to satisfy the claims upon it, and the conduct of the defendant had invited the suit. Baldwin v. Reardon, 48 *N. Y. Super. Ct.* (*J. & S.*) 166.

Where, in an action by the receiver of an insolvent national bank in which he was defeated, it would be inequitable to diminish the amount to be divided among its depositors. Hurd v. Farmers' Loan & Trust Co., 16 *N. Y. Weekly Dig.* 480.

Where the only defense was the Statute of Limitations, and the action involved no intricate question of law or fact, and its trial occupied but a short time. Adams v. Sterns, 29 *Hun*, 280.

Where the plaintiff failed in sustaining his claim, and the defendant his counterclaim and the complaint was dismissed. Hall v. U. S. Reflector Co., 5 *N. Y. Monthly Law Bul.* 1.

Where the plaintiff demanded $300 and recovered only $100. Fish v. Forrance, 5 *How. Pro.* 317.

Where two defendants, who succeeded in the action unnecessarily

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defended separately. Matthewson *v.* Thompson, 9 *How. Pr.* 231; Tillman *v.* Powell, 13 *Id.* 117.

Where two actions were brought for matters that might have been comprised in one. Sackett *v.* Ball, 4 *How. Pr.* 71; S. C., 2 *Code R.* 47.

Where the defendant was surety only. Gould *v.* Chapin, 2 *Code R.* 107; Rice *v.* Wright, 3 *How. Pr.* 405.

Where it was sought for the sole purpose of punishing the defeated party. Anonymous, 12 *How. Pr.* 317.

On the other hand it has been held that an allowance should be granted in every referred case. Niver *v.* Rossman, 5 *How. Pr.* 153; S. C., 3 *Code R.* 192.

Where the trial lasted four or five days, and required expensive services of scientific witnesses. Howard *v.* Rome & Tunic Plank Road Co., 4 *How. Pr.* 416; S. C., 3 *Code R.* 41.

Upon the dismissal of the complaint for the failure of the plaintiff to appear. Miles *v.* Watson, 45 *N. Y. Super. Ct.* (*J. & S.*) 591.

Where the defendants unnecessarily severed their defenses, thereby increasing the labor of the plaintiff's attorney, and the trial took sixteen days. Fort *v.* Gooding, 9 *Barb.* 388.

Where, in an action for the foreclosure of a mortgage, the defendant unnecessarily defended. Livingston *v.* Gidney, 25 *How. Pr.* 1.

Where the action was to recover $15,000 damages for the malicious interference by defendant of the plaintiff's use and enjoyment of premises held by him under a long lease, and the complaint was dismissed. Morrison *v.* Agate, 20 *Hun*, 23.

The prevailing practice in daily application for many years by the justices of the first department, sitting at circuit and special terms, has always been to construe the statute liberally, and a fair allowance in important and substancial litigations has been treated even by the defeated party as almost a matter of course, per BARRETT, J., Morrison *v.* Agate, 20 *Hun*, 23. And in the second department it has been the practice to grant an additional allowance in every case where there has been a trial. Schwartz *v.* Poughkeepsie Mut. Fire Ins. Co., 10 *How. Pr.* 93; Sackett *v.* Ball, 4 *Id.* 71; S. C., 2 *Code R.* 47.

There are many reported cases in which allowances were granted because the case was unreasonably and unfairly conducted. These were all decided under the Code of 1848 which contained a provision for allowances in such cases that was eliminated from the section by the amendment of 1857 (Laws of 1857, chap. 723, § 14), and has not since been restored. As those cases have no bearing on the law as it now is, they are not here cited.

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Note on Additional Allowances.

Reference of Claim against Executor.

Under the old Code it was held that a reference of a claim against a decedent's estate under 2 R. S. 89, was not an action, and therefore the successful party could not have an allowance. Van Sickler v. Graham, 7 *How. Pr.* 203; Avery v. Smith, 9 *Id.* 349.

Proceedings to Distribute Surplus Moneys.

The provision for an extra allowance does not apply to an application to the court for the distribution of the surplus money on a foreclosure sale, though it may allow a suitable sum to the parties for costs and disbursements. McDermott v. Hennessy, 9 *Hun*, 59; N. Y. Life Ins. & Trust Co. v. Vanderbilt, 12 *Abb. Pr.* 458; People v. Albany & Susquehanna R. R. Co., 5 *Lans.* 35.

On overruling demurrer with leave to plead anew.

Where judgment for the defendant on demurrer is reversed with leave to answer on payment of costs, an extra allowance cannot be granted so as to make the same part of the costs to be so paid (McDonald v. Mallory, 46 *N. Y. Super. Ct.* [14 *J. & S.*] 58), nor can it be granted where a demurrer was sustained at special term with leave to serve an amended pleading. De Stuckle v. Tehuantepec R. R. Co., 8 *N. Y. Civ. Pro.* 410.

Special Proceeding.

An extra allowance cannot be granted in a special proceeding under the railroad law. Matter N. Y., West Shore & Buffalo R. R. Co., 18 *N. Y. Weekly Dig.* 536; Rensselaer & Saratoga R. R. Co. v. Davis, 55 *N. Y.* 145). And see Bouyn v. N. Y., West Shore & Buffalo R. R. Co., 17 *N. Y. Weekly Dig.* 471; People v. Security Life Ins. Co., 23 *Hun*, 596.

Where value of subject matter uncertain.

As an allowance by the court in actions other than for the foreclosure of a mortgage must be computed "upon the sum recovered or claimed, or the value of the subject matter involved (*Code of Civil Procedure*, § 3263, subd. 2) it of necessity follows, that where no sum is claimed or recovered and the subject matter is such that an allowance cannot be calculated upon it, there can be no allowance (Giles v. Flagg, 25 *Barb.* 652; S. C., 15 *How. Pr.* 36; Coates v. Goddard, 34 *Super. Ct.* [2 *J. & S.*] 118; People v. Albany & Susquehanna R. R. Co., 5 *Lans.* 25; Powers v. Barr, 24 *Barb.* 142; Weaver v. Ely, 83 *N. Y.* 89; Canaughty v. Saratoga Co. Bank, 92 *N. Y.* 401; Ogdensburgh & Lake Champlain R. R. Co. v. Vermont & Canada R. R. Co., 63 *Id.* 176; People v. Genesee Valley Canal R. R. Co., 95 *Id.* 66; Diamond Match Co. v. Roeber, 35 *Hun*, 421), and even where the value

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of the subject matter is ascertainable, the court will not grant an allowance unless and until it has been determined. Flint *v.* Richardson, 2 *Code R.* 80; Dresser *v.* Jennings, 8 *Abb. Pr.* 240; *Contra* Archer *v.* Boudinet, 1 *Code R. N. S.* 372. And see the following decision here reported for the first time and cases therein cited.

LYON, ET AL., AS EXECUTORS, ETC., *v.* BELCHFORD, ET AL., AS SURVIVORS, ETC.

SUPREME COURT, FOURTH DEPARTMENT, JEFFERSON COUNTY, SPECIAL TERM, SEPTEMBER, 1882.

§ 3253.

Extra allowance—Basis on which to compute.

Where the papers upon which a motion for an extra allowance is made furnish no data upon which to compute an allowance, one should not be granted.

In an action to restrain the removal, &c., of bark before the close of the "peeling season," the basis upon which an allowance must be computed is the value of the right to remove, &c., such bark.

(*Decided September* 5, 1882.)

Motion by defendants, who succeeded in the action, for an extra allowance.

The opinion states the facts.

J. A. Steele, for defendants and motion.

C. D. Adams, for plaintiffs, opposed.

CHURCHILL, J.—This was an action for a permanent injunction tried at the special term in Lewis county, June 8th and 9th, 1881. Under the contract between the parties the defendants claimed the right to measure bark in reasonable quantities during the peeling season, and, upon paying or tendering the price, to remove the same from time to time at their convenience or pleasure.

This the plaintiffs deny, claiming that under the contract the bark should remain upon plaintiffs' land until close of peeling season, and then be measured and paid for, and then, and not till then, removed; and they brought this action to restrain the defendants from doing otherwise, than as the plaintiffs claimed this contract required.

"The subject matter involved" in the suit, therefore, was the right of the defendants, under the contract, to measure, pay for and remove the bark from time to time and before the close of the peeling season.

The court found for the defendants, and the complaint was dismissed. The defendants now move for an extra allowance.

The papers presented on this motion furnish no data from which

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to ascertain the pecuniary value of the right to remove bark before the close of the peeling season; and none, therefore, to measure the additional allowance if awarded. People *v.* Staten Island Ferry Co., 68 *N. Y.* 71; People *v.* Albany & Susquehanna R. R. Co., 5 *Lans.* 325.

The motion is, therefore, denied, with $10 costs to the plaintiffs, without prejudice to a renewal of the motion upon additional affidavits.

The provisions of the Code of Civil Procedure (§ 3253) simply authorize an allowance by the court in an action wherein rights of property are involved and a pecuniary value can be predicted of the subject matter; the importance of a litigation in any other than its pecuniary aspect affords no basis for the allowance, and when no money judgment is asked or rendered, and the subject matter involved is not capable of a money value, or the value is not shown, the allowance is not authorized. Canaughty *v.* Saratoga Co. Bank, 92 *N. Y.* 401.

In an action for an accounting, no fixed and definite sum being claimed in the complaint as due to the plaintiff, no extra allowances can be granted upon the dismissal of the complaint. Budd *v.* Smales, *N. Y. Daily Reg.* March 19, 1884.*

It has been held that there was no basis on which to compute an allowance, and therefore, that there could be no allowance by the court in an action brought by legatees, for an accounting by executors and trustees under a will and for payment of legacies, but of the assets and for charging the same on certain real property of the other defendant so far as the same might be applicable; where it was found by the referee that the estate was insolvent, and that the real property had been sold to pay debts of the deceased, and the complaint was dismissed, the subject matter being the plaintiff's interest which was nothing (Weaver *v.* Ely, 83 *N. Y.* 89); in an action to secure an injunction restraining the directors of a corporation from issuing bonds of the company and completing a contract for the purchase of

*This case was decided at Special Term of the Supreme Court New York county, March 18, 1885. The decision made on a motion for an extra allowance was as follows: LAWRENCE, J.—As this was an action for an accounting, and no fixed or definite sum was claimed in the complaint as due to the plaintiff, I do not see how an allowance can be made to the defendant on the dismissal of the complaint. The decision of the court of appeals in Weaver *v.* Ray (83 *N. Y.* 89), renders a denial of this motion unavoidable; see also (Coleman *v.* Chenny, 7 *Robt.* 578). No costs.

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real property on the ground that it was fraudulent (Spofford *v.* Texas Land Co., 41 *N. Y. Super. Ct.* [*J. & S.*] 87, but see Williams *v.* Western Union Tel. Co., 1 *N. Y. Civ. Pro.* 194, where it was held, that an allowance could be granted in an action to restrain one corporation from purchasing the property of the other, and also to enjoin it from paying a stock dividend declared by it); in an action to restrain the police commissioners of the city of New York from entertaining and recognizing a certain claim to the office of police commissioner, until an adjudication on the plaintiff's claim thereto (Voorhis *v.* French, 47 *N. Y. Super. Ct.* [*J. & S.*] 364); in an action brought to restrain the violation of an agreement not to carry on business within a certain territory (The Diamond Match Co. *v.* Roeber, 35 *Hun*, 421); in an action to restrain increasing the height of a party-wall, if the plaintiff claims no right or property in the materials used or the value of the erections (Musgrave *v.* Sherwood, 29 *Hun*, 475); in an action to restrain a railroad company from building the road along the line adopted by it, and to compel its construction upon another route, there being no evidence of the value of the right to locate on the route adopted (People *v.* Genesee Valley, etc. R. R. Co., 95 *N. Y.* 666); in an action to have certain railroad bonds surrendered as invalid wherein the defendant claimed they were valid, but offered to surrender them on being paid a certain sum which he claimed to have paid for them (Sickles *v.* Richardson, 14 *Hun*, 110); in an action to dissolve a corporation, where judgment is taken for want of an answer, and there is no evidence of the value of the franchise, the subject matter involved (People *v.* Rockaway Beach Imp. Co., 28 *Hun*, 356); in an action of ejectment by a lessee, if there is no evidence of the value of the possession over and above the amount of rent reserved by the lease (Heilman *v.* Lazarus, 12 *Abb. N. C.* 19; S. C., 65 *How. Pr.* 95; less fully, 90 *N. Y.* 672); in an action to recover the possession of personal property where its value has not been assessed (Flint *v.* Richardson, 2 *Code R.* 80; *contra*, Archer *v.* Boudinet, 1 *Code R. N. S.* 372); where the subject of the action was a trade-mark (Coates *v.* Goddard, 34 *N. Y. Super. Ct.* [2 *J. & S.*] 118); in an action to try title to office (People *v.* Flagg, 25 *Barb.* 252; S. C., 15 *How. Pr.* 56).

The power of the court to grant an extra allowance in an action to restrain the enforcement of a final determination in summary proceedings is, it seems, doubtful. Sheely *v.* Kelly, 33 *Hun*, 543; and see Grissler *v.* Stuyvesant, 67 *Barb.* 81.

The value of the subject matter involved may be determined *it seems*, by affidavits presented on the application for the allowance. Lyon *v.* Betchford, *ante*, p. 229, *note*.

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Note on Additional Allowances.

Tender: offer of judgment.

The following decision seems to state correctly the law governing the granting of extra allowances by the court where an offer of judgment is made and accepted.

POOL v. OSBORN.

SUPREME COURT. FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, DECEMBER, 1884.

§ 3253.

The court has no power to grant an extra allowance to the plaintiff upon his acceptance of an offer of judgment for a stated amount and costs.

(*Decided December* 4, 1884.)

Motion by plaintiff for an extra allowance under section 3253 of the Code of Civil Procedure.

The defendant made an offer of judgment for an amount stated therein with costs, which the plaintiff accepted, and thereafter made this motion.

LAWRENCE, J.—I still think that when an offer is made by the defendant, under section 738 of the Code of Civil Procedure, to allow judgment to be taken against him for a specified sum, with costs, that there is no power in the court to grant an extra allowance to the plaintiff. The costs referred to in that section are, I think, the statutory costs. I have examined the cases referred by counsel, but none of them seem to be in point. They were all cases in which no offer to compromise had been made. To hold that a specific offer can be added to by granting an allowance, would be to impose upon the defendant an expense which he did not contemplate at the time of making the offer, and to which he has never assented. Motion denied, without costs.

See, however, to the contrary, Coates *v.* Goddard, 34 *Super.* (2 *J. & S.*) 118.

Where the defendant in a foreclosure action after it was at issue and noticed for trial tendered the amount due, and costs, and the plaintiff accepted the tender; *held*, that it was too late for him to apply for an extra allowance. Lockman *v.* Ellis, 58 *How. Pr.* 100 (Super. Ct., Sp. T.); but in Moulton *v.* Beecher (1 *Abb. N. C.* 245), it was held, that receiving costs on the discontinuance of an action did not necessarily prejudice a pending motion for an allowance.

In Brace *v.* Beatty (7 *Abb. Pr.* 445; rev'g S. C., 5 *Id.* 221), *held*, that the plaintiff could not have an extra allowance on the tender by defendant of the debt and costs.

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Where right doubtful.

Where the authority of the court to grant an extra allowance is doubtful, it should be refused (Sheehy *v.* Kelly, 33 *Hun.* 543 ; Gould *v.* Chapin, 4 *How. Pr.* 185); particularly, if only a small allowance could in any event be granted. Sheehy *v.* Kelly, *supra.*

In Surrogate's Court.

Sections 2559 to 2568 of the Code of Civil Procedure provide for the granting of costs and allowances in surrogates' courts. They do not seem to make the provisions of the Code relative to extra allowances in actions, treated of in this note, applicable to those courts ; and there are not any reported decisions holding that they do.

In a number of cases decided under the Code of Procedure it was held that an extra allowance might be granted, as in an action, upon an appeal from a surrogate's decree. Noyes *v.* Children's Aid Soc., 70 *N. Y.* 481 ; Depuy *v.* Warts, 1 *Hun*, 119 ; Seguine *v.* Seguine, 8 *Abb. Pr. N. S.* 442.

These decisions were made under section 818 of the Code of Procedure, providing that "when the decision of a court of inferior jurisdiction in a special proceeding, including appeals from the surrogates' courts, shall be brought before the supreme court for review, such proceedings shall, for all purposes of costs, be deemed an action at issue on a question of law, from the time the same shall be brought into the supreme court, and costs thereon shall be awarded and collected in such manner as the court shall direct, according to the nature of the case."

This section was repealed by Laws of 1880, chapter 245, and no similar provision enacted in its place. These decisions are, therefore, clearly inapplicable to the Code as it now is.

Application for, to whom and where made.—Rule 44 of General Rules of Practice provides that "applications for an additional allowance can only be made to the court before which the trial is had, or the judgment rendered." To same effect, Niver *v.* Rossman, 5 *How. Pr.* 153.

The application can only be made to the court of original jurisdiction (Wolfe *v.* Van Nostrand, 4 *How. Pr.* 208; S. C., 2 *N. Y.* 570; People *v.* N. Y. Central R. R. Co., 29 *N. Y.* 518; Hun v. Salter, 24 *Hun*, 640) ; and in reference to the trial in that court (Wolfe *v.* Van Nostrand, *supra*); and cannot be made to the appellate court (Wolfe *v.* Van Nostrand, *supra ;* People *v.* N. Y. Central R. R. Co., *supra ;* Gori *v.* Smith, 8 *Abb. Pr. N. S.* 51; Martin *v.* McCormick, 2 *Sandf.* 755); it should be made at the circuit (or term) at which the case was tried, or to the justice who held the same, and to none other.

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Saratoga & Washington R. R. Co. *v.* McCoy, 9 *How. Pr.* 339; Osborne *v.* Betts, 8 *Id.* 31; Dyckman *v.* McDonald, 5 *Id.* 121; Van Rensselaer *v.* Kidd, 5 *Id.* 242; Sackett *v.* Ball, 4 *Id.* 71; Mann *v.* Pope, 16 *Id.* 271; Hun *v.* Salter, 24 *Hun*, 640; Flint *v.* Richardson, 2 *Code R.* 80; and see also Hotaling *v.* Marsh, 14 *Abb. Pr.* 161; rev'g S. C., 13 *Id.* 297, *note*. *Contra*, Gori *v.* Smith, 3 *Abb. N. S.* 51, where it was held that while an appellate court could not entertain the motion, its hearing was not restricted to the individual judge before whom the action was tried; and see Bear *v.* American Rapid Tel. Co., 36 *Hun*, 400.

An application for an extra allowance can be made only to the justice before whom the action was tried (Hun *v.* Salter, 24 *Hun*, 640; reversed on ground that motion therefor cannot be made out of district, 92 *N. Y.* 651; Lattimer *v.* Livermore, 6 *Daly*, 501); and if another judge has granted it, it is proper for him to vacate the order, and direct the motion to be heard before the judge who tried the case. Lattimer *v.* Livermore, *supra*.

It was held under the Supreme Court Rules of 1858 (Rule 52), which was substantially the same as the part of Rule 44 of the present Rules of Practice, quoted *supra*, that the word "court" evidently meant "justice" (Dyckman *v.* McDonald, 5 *How. Pr.* 121; Osborne *v.* Betts, 8 *Id.* 31); but in the later cases under the same rule, it was decided that allowances of extra costs must be made by the "court," and not by a justice at chambers (Mann *v.* Tyler, 6 *How. Pr.* 235; S. C., 1 *Code R. N. S.* 382; see also Van Rensselaer *v.* Kidd, 5 *How. Pr.* 242; S. C., 3 *Code R.* 224); except in the first district (Main *v.* Pope, 16 *How. Pr.* 271).

A motion for an extra allowance where judgment was taken by default, may be made at special term. Mills *v.* Watson, 45 *N. Y. Super.* (13 *J. & S.*) 591.

Where a plaintiff had a verdict, and judgment was suspended, and the exceptions ordered to be heard in the first instance at general term, and the exceptions were there sustained, and a new trial ordered, and the court of appeals affirmed the order of the general term, and directed judgment absolute with costs in favor of the defendant; on plaintiff's stipulation it was held that the court of original jurisdiction had power to grant an extra allowance. Parrot *v.* Sawyer, 26 *Hun*, 466.

The application should be made in the county where the judgment is rendered, unless some special reason exists for making the application elsewhere (Niver *v.* Rossman, 5 *How. Pr.* 153; S. C., 3 *Code R.* 102; *contra*, Strong *v.* Snyder, 6 *How. Pr.* 11); and cannot be made without the district in which the action was tried, even

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though the judge before whom it was tried does not reside within the district. Hun v. Salter, 92 *N. Y.* 651; Bear v. American Rapid Tel. Co., 36 *Hun*, 400; *Code of Civil Procedure*, § 769.

Where the action is tried before a referee the application should be made to the court at special term; the referee cannot grant an allowance. Sackett v. Ball, 4 *How. Pr.* 71; Osborne v. Betts, 8 *Id.* 31; Howe v. Muir, 4 *Id.* 252; Niver v. Rossman, 5 *Id.* 158.

The same rule governs as to place of application, whether the cause was tried before the court or a referee. Spring v. Snyder, 6 *How. Pr.* 11; Niver v. Rossman, 5 *Id.* 158.

Time of application. The application for an extra allowance cannot be entertained until all litigation is ended (Powers v. Wolcott, 12 *How. Pr.* 565; McDonald v. Mallory, 46 *N. Y. Super.* (14 *J. & S.*) 58; De Stuckle v. Tehuantepec Ry. Co., 3 *N. Y. Civ. Pro.* 410); it should be made at the coming in of the verdict, or report of referee; and not later than the end of the term at which the trial was heard (Flint v. Richardson, 2 *Code R.* 80; see also Van Rensselaer v. Kidd, 5 *How. Pr.* 242; S. C., 3 *Code R.* 224); it cannot be granted on the entry of an interlocutory judgment, but only when final judgment is pronounced. De Stuckle v Tehuantepec Ry. Co., *supra*; McDonald v. Mallory, *supra*.

The allowance must be made before costs have been adjusted (*General Rules of Practice*, 44; Clark v. City of Rochester, 29 *How. Pr.* 97; aff'd, 34 *N. Y.* 355; Martin v. McCormick, 8 *Sandf.* 755; Beals v. Benjamin, 29 *How. Pr.* 111; rev'g 29 *Id.* 97; Williams v. Western Union Tel. Co., 61 *How. Pr.* 305); and cannot be granted after judgment has been entered (*Id.*); but the court has power where costs have been inadvertently taxed, to set aside the taxation for the purpose of permitting a motion for an extra allowance to be made. Dietz v. Farish, 43 *N. Y. Super.* (*J. & S.*) 87.

And in an equity action where the decree directs the clerk of the court to insert the amount of the costs in the judgment, the adjustment of costs is a proceeding subsequent to the entry of judgment, and the entry of the judgment will not prevent the making and granting of an extra allowance if the costs have not been taxed. Williams v. Western Union Tel. Co., 1 *N. Y. Civ. Pro.* 194, 200.

Likewise after judgment on appeal, it is too late to apply to the general term. Van Rensselaer v. Kidd, 2 *How. Pr.* 242; S. C., 2 *Code R.* 224. See also Wolfe v. Van Nostrand, 2 *N. Y.* 570; Osborne v. Betts, 8 *How. Pr.* 31; Jorden v. S. & L. Bank, 45 *N. Y. Super.* (*J. & S.*) 423; Martin v. McCormick, 3 *Sandf.* 755.

In Sackett v. Ball (4 *How. Pr.* 71), a delay of five months, caused

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by professional engagements, was held sufficient to defeat an application for an allowance.

In Saratoga & Washington R. R. Co. v. McCoy (9 *How. Pr.* 341), where a trial was had at the circuit, and about two months after, at a special term, a motion was made for an extra allowance; it was held, that the delay was no waiver of the right to move, and an allowance was granted.

A motion for an extra allowance is premature if made before the right to recover the ordinary taxable costs in the action has been determined. *Semble*, that it is proper to unite in one motion the application for costs and an extra allowance, and that it may be done on the same papers. Mersereau v. Ryerss, 12 *How. Pr.* 300.

Motion for; Notice. Notice of an application for an extra allowance of costs is not necessary where the judge who tries the cause makes the order at the same term; nor need the party against whom it is made be present in court (Mitchell v. Hall, 7 *How. Pr.* 490; Van Rensselaer v. Kidd, 5 *Id.* 242; S. C., 3 *Code R.* 294). If the order is not then made due notice must be given. Mann v. Tyler, 6 *How. Pr.* 235; S. C., 1 *Code R. N. S.* 382; Saratoga and Washington Railroad Co. v. McCoy, 9 *How. Pr.* 339; Niver v. Rossman, 3 *Code R.* 192; S. C., 5 *How. Pr.* 153; Howe v. Muir, 3 *Code R.* 21; S. C., 4 *How. Pr.* 252.

The party making the application must be furnished with an affidavit setting forth the facts, in order that the court may judge of the proper amount to be allowed. Gori v. Smith, 3 *Abb. N. S.* 51; S. C., 6 *Robt.* 563; Gould v. Chapin, *post;* Main v. Pope, *post.*

A mere certificate that, in the opinion of the referee, the case comes within the section, will not answer. The affidavit must be made by the referee and not by a party. Gould v. Chapin, 4 *How.* 185; S. C., 2 *Code R.* 107; Main v. Pope, 16 *How.* 271.

The rule is the same with regard to an application for an extra allowance, whether the cause has been heard by the court or a referee. Sprong v. Snyder, 1 *Code R. N. S.* 178; S. C., 6 *How.* 11; Niver v. Rossman, 5 *Id.* 153; S. C., 3 *Code R.* 192.

Costs of such motions are never granted (Schwartz v. Poughkeepsie Mutl. Fire Ins. Co., 10 *How. Pr.* 93; Dickson v. Elwain, 7 *Id.* 140), except where the motion is denied, and it is very evident that it should not be granted. Jordan v. S. & L. Bank, 45 *N. Y. Super. Ct.* (*J. & S.*) 423.

Where the hearing of a motion for an extra allowance by the plaintiff was adjourned, and, in the interval, the plaintiff entered up judgment, which was paid, and the judgment satisfied, and the plaintiff's attorney did not countermand the notice of the motion, no special

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instructions from his client to proceed being shown, the motion was denied, with costs to be paid by the plaintiff's attorney personally; and the order was affirmed upon appeal to the general term. Jordan v. S. & L. Bank, 45 *N. Y. Super. Ct.* 423.

Amount. This is fixed by section 3253 of the *Code of Civil Procedure*, quoted at length, *ante*, p. 219, and is "1. In an action to foreclose a mortgage" on real property "a sum not exceeding two and one-half per centum upon the sum due, or claimed to be due upon the mortgage, nor the aggregate sum of $200." 2. In an action for the partition of real property or in a difficult or extraordinary case, where a defense has been interposed in any action, "a sum not exceeding five per centum upon the sum recovered or claimed, or the value of the subject matter involved."

Extra allowances in mortgage foreclosure cases are restricted to two and one-half per cent. upon the sum due or claimed to be due, the aggregate allowance not to exceed $200. Hunt v. Chapman, 62 *N. Y.* 438; Rosa v. Jenkins, 31 *Hun*, 384. The latter case distinguishing Bockes v. Hathorn, 17 *Hun*, 87, which held, that an allowance of five per cent. could be made in such cases, as being under section 309 of the old Code as amended by Laws of 1876, chap. 431, and not applicable to the present statute. An extra allowance of five per cent. is therefore unauthorized and improper. *Id.*

In a difficult and extraordinary case, the court may, in its discretion, allow any amount that the circumstances warrant, within the statutory limit. Union Bank v. Mott, 13 *Abb. Pr.* 47.

The limit of allowances is fixed for the benefit of the defeated party. Dresser v. Jenkins, 8 *Abb. Pr.* 240.

A proper basis for computing the per centage authorized by this section of the Code is the value of the property to be directly affected by the result of the action. People v. Albany & Vermont R. R. Co., 16 *Abb. Pr.* 465. The word "involved" means affected (Williams v. Western Union Tel. Co., 1 *N. Y. Civ. Pro.* 350; Burke v. Candee, 65 *Barb.* 552; and see Coleman v. Chauncey, 7 *Robt.* 573), and the term "subject-matter involved" refers simply to property or other valuable thing, the possession, ownership or title to which is to be determined by the action; it does not include other property, although it may be directly or remotely affected by the result. Conaughty v. Saratoga Co. Bank, 92 *N. Y.* 401.

The sum recovered includes and covers all damages awarded to a party and recovered by him in an action, whether computed by a jury, a court, or a referee, or given solely by statute or partly dependent on both. Boyd v. N. Y. Central & Hudson R. R. Co., 6 *N. Y. Civ.*

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Pro. 222; Clegg *v.* Aikens, *post*, p. 249; but see Sinne *v.* Mayor, *post*, p. 251, *note*.

It is only where the defendant has judgment that the allowance can be computed on the amount claimed. Wilkinson *v.* Tiffany, 4 *Abb. Pr.* 98.

An allowance under this section may be computed not only on the plaintiff's demand, but on the defendant's counter-claim determined against him. Woonsocket Rubber Co. *v.* Rubber Clothing Co., 1 *N. Y. Civ. Pro.* 350, where the subject is fully discussed; Barclay *v.* Culver, 4 *Id.* 365.

In an action for causing death an extra allowance should be computed upon the sum awarded by the jury, and the interest thereon from the date of the death of the deceased, which the Code requires the clerk to add thereto. Boyd *v.* N. Y. Central & H. R. R. Co., 6 *N. Y. Civ. Pro.* 222; but see to the contrary Sinne *v.* Mayor, *post*, p. 251, *note*.

In an action to open accounts on the ground of fraud where there was nothing in the pleadings or evidence to show the amount involved, a statement of the plaintiff's attorney, in opening the case, as to the amount he expected to show that his client was entitled to recover, is a sufficient basis for an extra allowance to the defendant. Rutty *v.* Person, 6 *N. Y. Civ. Pro.* 25.

In an action to establish the plaintiff's right to one quarter of the value of a lease of real estate, the value of the quarter sued for was held to be the only basis for an allowance. Struthers *v.* Pearce, 51 *N. Y.* 499.

In an action to recover damages for a trespass, where title to real property is the question involved in the issue, an extra allowance may be computed on the value of the property instead of the amount of the damages recovered; thus an allowance of $100 was granted on dismissal where the property was worth $2.000 and the damages demanded were $100. Warren *v.* Buckley, 2 *Abb. N. C.* 323.

In an action of ejectment where there was no proof of the value of the particular lot of land in suit, but only proof of the value of that lot and others taken together, an allowance to the defendant should be based only upon the damages claimed by the plaintiff. Rank *v.* Grote, 50 *N. Y. Super. Ct.* (18 *J. & S.*) 275.

In an action to restrain the enforcement of a judgment in summary proceedings in case of alleged forcible entry and detainer, the value of the leasehold, and not the value of the premises, is the basis on which an extra allowance, if granted, should be computed. Sheehy *v.* Kelly, 33 *Hun*, 543.

In an action by a judgment creditor to set aside as fraudulent, a

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conveyance of land by the debtor, an extra allowance to the plaintiff must be computed on the amount of the judgment, not the value of the land. Potter *v.* Farrington, 24 *Hun*, 551. To same effect, Remington Paper Co. *v.* O'Dougherty, 19 *N. Y. Weekly Dig.* 190.

In an action to determine the validity of the lease of a railroad, *held*, that the value of the lease, and not the value of the road or the rental value thereof, was the proper basis of an extra allowance under the former statute. Ontario & Lake Champlain R. R. Co. *v.* Vermont & Canada R. R. Co., 68 *N. Y.* 176.

In an action to restrain the erection of a pier, *held*, that an allowance of five per centum on the value of the pier was erroneous. The matter in the controversy was the right to erect the structure, not the title to the materials or the value of the erections. People *v.* N. Y. & S. I. F. Co., 68 *N. Y.* 71; rev'g on that point S. C., 7 *Hun*, 105.

In an action to restrain an infringement of an easement, the value of the easement is the basis on which an allowance is computed. Lattimer *v.* Livermore, 72 *N. Y.* 174.

In an action for damages for refusal to accept goods sold, an allowance may be made to the plaintiff on recovery on the whole amount, although the defendant admitted liability on the trial for a part of the goods. Austin *v.* Hartwig, 49 *N. Y. Super. Ct.* (17 *J. & S.*) 256.

Where the controversy was as to the defendant's right to the property of a certain telegraph company, *held*, that an extra allowance might be granted, based upon the value of the property. Williams *v.* Western Union Tel. Co., 1 *N. Y. Civ. Pro.* 194.

In an action to abate a nuisance, the plaintiff's extra allowance must be computed, not upon the value of his lands, but only upon the amount of damages recovered. N. Y. Rubber Co., 90 *N. Y.* 30; aff'g 24 *Hun*, 172.

In an action to recover $15,000 damages for a malicious interference by defendant with the plaintiff's enjoyment and occupation of valuable premises, held under a long lease, the complaint having been dismissed at circuit, an extra allowance to defendant of the sum of $250 was held reasonable and proper. Morrison *v.* Agate, 20 *Hun*, 23.

In an action to recover damages for the taking of personal property, an allowance should be computed on the value of the property and not on the damages claimed. Saratoga & Washington R. R. Co. *v.* McCoy, 9 *How. Pr.* 339.

Section 3254 of the Code of Civil Procedure reads as follows :— the explanatory remarks in brackets being inserted by the writer— "But all the sums awarded to the plaintiff, as prescribed in section

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3252 of this act [*i. e.*, the allowance by statute], or to a party, or two or more parties on the same side, as prescribed in the last sentence of section 3251 of this act [*i. e.*, damages for delay in the court of appeals], and in subdivision second of the last section [§ 3253, *i. e.*, in an action for partition or a difficult and extraordinary case], cannot exceed in the aggregate $2,000."

It appears, therefore, that the aggregate allowances that can be granted in an action, to a party, or to two or more parties on the same side, may amount to but cannot exceed $2,000, except in an action to foreclose a mortgage on real property, where the allowances are limited to not over $60 allowance by statute and $200 allowance by the court.

While the additional allowances in an action provided for in section 3253 of the Code, cannot ordinarily exceed $2,000, where parties who may be adversely related to the action are each successful, and for that reason become entitled to costs, this restraint has no application, further than the allowance should not exceed $2,000 to the parties on each side of the action. Weed *v.* Paine, 4 *N. Y. Civ. Pro.* 305.

Extra allowances, when granted to more than one defendant, must not exceed in the aggregate five per cent. of the amount claimed. Lane *v.* Van Orden, 11 *Abb. N. C.* 228.

Appeal. An appeal lies to the general term and from its decision in a proper case to the court of appeals, from an order granting an extra allowance (Mills *v.* Watson, 45 *N. Y. Super. Ct.* (*J. & S.*) 591; Gooding *v.* Brown, 35 *Hun*, 153; People *v.* N. Y. Central R. R. Co., 39 *N. Y.* 418; Ogdensburgh & Lake Champlain R. R. Co. *v.* Vermont & Canada R. R. Co., 68 *Id.* 176; Gori *v.* Smith, 6 *Robt.* 568); and that although granted by default, if it was made at circuit without special notice, and the court had no power to grant one; in such a case, notice of the application is not implied in the notice of trial. Voorhis *v.* French, 47 *N. Y. Super. Ct.* (*J. & S.*) 364.

Where the court had power to grant an allowance, and the right thereto depends upon whether the action is to be regarded as difficult and extraordinary, the determination of that question involves so many considerations which are addressed to the discretion of the judge, that the appellate court will rarely interfere (Morrison *v.* Agate, 9 *N. Y. Weekly Dig.* 386; Bryon *v.* Durrie, 6 *Abb. N. C.* 135; Tolman *v.* Syracuse, B. & N. R. R. Co., 31 *Hun*, 397, 403; Gooding *v.* Brown, 35 *Id.* 153). The judge before whom the case is tried has means, not necessarily presented on an appeal, of acting advisedly in reference to all the circumstances bearing upon the decision of the question, and his discretion will not be deemed to have been

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improperly exercised unless it clearly so appears (Tolman *v.* Syracuse, B. & N. R. R. Co., 31 *Hun*, 397, 403, and cases there cited; Gooding *v.* Brown, 35 *Id.* 153). The usual presumption is that the order is correct unless the contrary appears (*Id.*; Everingham *v.* Vanderbilt, 12 *Hun*, 75). Accordingly *held*, that on appeal from an order granting an extra allowance if the amount involved in the controversy does not appear, it will be presumed that the allowance does not exceed the legal rate (Everingham *v.* Vanderbilt, *supra*). On the review of such orders strict and sole reliance cannot be had on the papers (*Id.*; Burke *v.* Candee, 63 *Barb.* 555), but where it appears that the order was granted on improper papers, it will be reversed. Gori *v.* Smith, 3 *Abb. N. S.* 51; S. C., 6 *Robt.* 563.

Within the limitations fixed by the provisions of the Code, the power of the court below to make allowances is not subject to review in the court of appeals; but the question whether an allowance exceeds those limitations is one of law, proper to be considered by that tribunal. Conaughty *v.* Saratoga Co. Bank, 92 *N. Y.* 401; Southwick *v.* Southwick, 49 *N. Y.* 510; Krekeler *v.* Ritter, 62 *Id.* 375; Noyes *v.* Childrens' Aid Soc., 70 *N. Y.* 481.

Where through inadvertence an extra allowance slightly in excess of the sum allowed by the statute was granted—*Held*, that the remedy was by motion to correct the judgment, not by appeal. Kraushaar *v.* Meyer, 72 *N. Y.* 602.

Effect. The granting of an extra allowance is no bar to the recovery of damages upon an injunction undertaking on a vacatur of the injunction (Howell *v.* Miller, 5 *N. Y. Civ. Pro.* 164; Troxell *v.* Haynes, 5 *Daly*, 390); and the fact that such an undertaking has been given will not prevent the granting of an extra allowance. Williams *v.* Western Union Tel. Co., 1 *Id.* 194.

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SCHNEIDER, ET AL., APPELLANTS, *v.* ALTMAN AND ANOTHER, RESPONDENTS.

CITY COURT OF NEW YORK, GENERAL TERM, JUNE, 1885.

§§ 2432 *et seq.*

Supplementary proceedings—Extent of examination of judgment debtor when he has made assignment for benefit of creditors.

A judgment debtor may be examined in proceedings supplementary to execution as to property owned by him at and prior to the time of the making an assignment for the benefit of creditors, and as to the disposition made of it, and that in the city court of New York notwithstanding that court has not jurisdiction of an equitable action to reach such property as may be shown to have been fraudulently disposed of.

(*Decided June* 26, 1885.)

Appeal from order of judge at chambers limiting examination of defendants in proceedings supplementary to execution, and restricting the inquiry to such property only as might have been acquired by said defendants subsequent to the making of an alleged general assignment by them, and sustaining defendants' objections to any questions relating to property owned by said defendants prior to said assignment.

The supplementary proceedings were founded upon a judgment recovered by the plaintiff in this court on November 6, 1884, for $1,669.32, for merchandise sold and delivered defendants between May 1, and September 25, 1884.

The defendant Altman testified that the firm made an assignment on September 27, 1884, and thereupon the court sustained the objection of defendants' counsel to any matter happening prior to the date of the

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alleged assignment, and made an order which, after reciting the facts, provided as follows:

"Ordered that the objection of said defendants' attorney to any questions relating to property owned by said defendants prior to the making of said alleged general assignment, be and the same hereby is sustained.

"And it is further ordered, that the examination of said defendants, under said order, be and the same hereby is limited and restricted to an inquiry concerning such property only as may have been acquired by said defendants since the date of said alleged general assignment."

From that order the judgment creditor took this appeal.

F. A. Burnham, for judgment-creditor, appellant.

In construing section 292 of the former Code, the court of appeals held that the judgment debtor and his transferees "were in duty bound to answer all questions seeking for information as to recent transfers of property by this debtor, and particularly as to whether such transfers were honest or not. In short, it was their duty to answer fully any question tending to disclose any property of this debtor, whether held by him or by a fraudulent transferee who holds in fraud of creditors." Lathrop *v.* Clapp, 40 *N. Y.* 328, 330. See also Clapp *v.* Lathrop, 23 *How. Pr.* 423; Sandford *v.* Carr, 2 *Abb. Pr.* 462; Forbes *v.* Willard, 54 *Barb.* 520; S. C., 37 *How. Pr.* 193. . . . . .

But it may be argued that the appellants are seeking to discover evidence and not property. If it be shown that the assignment is fraudulent, the title to the property is still in equity in the judgment debtor, and the examination thus proves to be a direct method of discovering property. In the case of a sale, where the property is in the possession of the purchaser who

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claims to own it, the fullest inquiry is permitted for the purpose of ascertaining whether the transfer is fraudulent or not. And yet the judge, before whom the proceeding is pending, cannot set aside the sale and order the property given over to the creditor, but the further proceedings to reach it must be through an action. Lathrop *v.* Clapp, *supra*, at p. 333; Mechanics' & Traders' Bank *v.* Healy, 14 *N. Y. Weekly Dig.* 120. Precisely so here.

The exact point involved in this appeal has already been passed upon in appellant's favor in the superior court of this city, in Seligman *v.* Wallach, 6 *N. Y. Civ. Pro.* 232. To the same effect is the decision of the court of common pleas. *In re* Rindskopf, *Court Journal*, January 9, 1885, p. 441. And the same question has been passed upon in the same way at chambers of the supreme court of this department, though no case has been as yet reported. Bannigan *v.* Piek, *Chambers Supm. Ct. First Dept.*, May, 1884, unreported. . . It cannot be successfully claimed that because of the assignment the examination in relation thereto and concerning the property attempted to be conveyed thereby, can only be had in the court of common pleas under the assignment act. Such an examination will only be permitted where it is in aid of and not in hostility to the assignment. Matter of Everit, 10 *Daly*, 99; Matter of Goldschmidt, 10 *Id.* 38; Matter of Brown, 10 *Id.* 115; Matter of Burtnett, 8 *Id.* 363; Matter of Rindskopf, *supra*.

Joseph Kohler (*Shuster & Kohler*), attorneys, for judgment debtors, respondents.

It has been decided by this court that under circumstances similar to those presented by the case at bar, the examination should be restricted to property acquired subsequent to the filing of the general assignment (Bacon *v.* Goldsmith, 1 *City Ct. R.* 402). There

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is nothing in section 2460 of the Code of Civil Procedure justifying a different rule than has been laid down in the case above cited, and it has no bearing upon the case. While it speaks of an examination relating to any transfer of property by a judgment debtor, it is silent as to the power of the creditor to enter into an inquiry upon that subject as a matter of strict right in all cases. It was only for the purpose of relieving a party guilty of a fraud from the effect of his admissions in a criminal proceeding that this provision was enacted, and it is still left open to the court to regulate and circumscribe the limits of the examination.

HAWES, J.—It appears from the record that the defendant, a judgment debtor, was under examination in proceedings supplementary to execution, and that, while being examined, the fact was disclosed that he had made a general assignment to one Charles Cass, for the benefit of his creditors. Upon such disclosures, the defendant's counsel objected to any and all questions "relating back prior to the filing of the assignment." This objection was sustained, the court holding that "the examination must be limited to property acquired since the assignment," to which an exception was taken, and this ruling and exception is now presented for review.

It is quite clear that as to property acquired prior to the assignment, an examination could only furnish proof of its fraudulent disposition, and the judgment creditor would, in one sense, be securing evidence and not property, and as this court possesses no equitable jurisdiction, and could not entertain a suit to set the assignment aside, the judgment creditor could secure no advantages in this tribunal, and, for economic reasons, the examination has frequently been restricted to after acquired property.

I am unable, however, to see how this course can

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be sustained upon any legal or equitable principle. It is well settled in the court of common pleas that no examination will be allowed which seeks to set aside the assignment, and will only be permitted where it is in aid of it. "The examination should not extend to an inquiry as to whether the preferences are fraudulent, or as to whether the assignors, either in making the assignment or in transactions anterior to the assignment, did any act that was fraudulent in fact or fraudulent in contemplation of law. No inquiry as to what the assignors, prior to the assignment, did with the borrowed money or with their own property should be permitted." *In re* Rindskopf, *Dist. Ct. Jour.*, January 9, 1885, opinion by VAN HOESEN, J.* See to

* The opinion *In re* Rindskopf (*N. Y. Com. Pl. Sp. T.*), was filed January 6, 1885, and is as follows:

VAN HOESEN, J.—The order for the examination should be modified so as to provide that the examination of the books shall be under the control of a referee, and that the assignee or his representative may be present.

The examination should not extend to an inquiry as to whether the preferences are fraudulent, or as to whether the assignors, either in making the assignment, or in transactions anterior to the assignment, did any act that was fraudulent in fact, or fraudulent in contemplation of law. No inquiry as to what the assignors, prior to the assignment, did with borrowed money, or with their own property, should be permitted. Of course, their transactions subsequent to the assignment are not subjects of this examination.

There may be an examination as to the amount of property embraced in the assignment. There may, also, be an examination as to the amount of debts that appear on the books to be payable out of the assigned estate; but the referee shall not permit the petitioners, under the pretense that they are ascertaining the amount of debts appearing on the books, to pursue an inquiry as to whether the book entries are fictitious, or whether the assignors were actually indebted to the amounts that appear on the books as to claims against them.

As has been said before, an examination whose object is to discover evidence that may be used in an action (either already begun or merely in contemplation) to set aside the assignment as fraudulent, must be had under the Code of Civil Procedure, and not under the General Assignment Act.

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same effect, Matter of Everitt, 10 *Daly*, 99. Nowhere else can an examination therefore be had as to the property of the judgment debtor concealed under the guise of a general assignment, except in the court where the judgment was obtained, and in all fairness it would seem that they were justly entitled to it. They are invited to this forum, and after the recovery of a judgment, they find themselves powerless to investigate concealed property.

All the other courts of record in this department allow such an examination (Seligman *v.* Wallach, 6 *N. Y. Civ. Pro. Rep.* 232; Bannigan *v.* Piek, *Chambers, Supm. Ct.*, May, 1884, unreported;* Mechanics' and Traders' Bank *v.* Healy, 14 *N. Y. Week. Dig.* 120); and I am unable to see why the judgment creditor is not legally entitled to it as a matter of right. The mere fact that he must bring another proceeding, and that that must be in another forum, does not affect his rights. In nearly all cases where fraudulent transfers have been made, and the apparent title is in a third person, he is compelled to bring an action, and in doing so he can select his own tribunal; but it would not for a moment be held that therefore he should not be allowed to inquire as to this concealed property. There is nothing sacred about a general assignment as distinguished from any other. If a judgment debtor fraudulently disposes of some of his property, and places it in the apparent ownership of a third person, an examination as to such disposition is allowed; but if he so disposes of all his property, an opposite rule has prevailed in this court; but I find no warrant for such a conclusion, either in the Code or in the equitable

* In Bannigan *v.* Piek, an objection taken in the course of an examination in supplementary proceedings to questions concerning property owned by the judgment debtor at and prior to the time he made a general assignment, was orally overruled by Mr. Justice Donohue. No written opinion or decision was ever made or filed.

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treatment which the court owes the suitors who seek its protection. The Code (§ 2460) expressly provides that a party shall not be excused from answering a question on the ground that his examination will tend to prove that he has been "a party or privy to, or knowing of a conveyance, assignment, transfer or other disposition of property for any purpose." The examination of a judgment debtor is designed to be liberal and exhaustive, and to discover, if possible, any property which the judgment debtor may have, wherever located, and whoever might hold the apparent title.

Property fraudulently conveyed to a general assignee involving fraudulent perferences and fictitious debts is still in equity the property of the judgment debtor, and its discovery under such circumstances is not the discovery of evidence, but the actual discovery of property, and its recovery is solely a question of practice and procedure which is but a mere incident. A general assignment is simply a personal disposition of property, and the law has thrown about it no special safeguard. The property so conveyed is subject to the claims and demands of creditors in any forum, or method of proceeding which they may institute to reach it, and to protect a fraudulent debtor in such concealment has, in my opinion, no warrant or justification in law. The case of Lathrop *v.* Clapp (40 *N. Y.* 328), cited by appellants, presents this question fully and conclusively.

It may be irksome for this court to allow these examinations with full knowledge that the court can grant no relief for its recovery by reason of its want of equity jurisdiction, but this furnishes no sufficient reason why its litigants should be deprived of their rights to discover the property of a judgment debtor, however concealed or transferred. The method by which the judgment creditor shall secure its possession, is, in my view of the case, a subject wholly for-

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eign to the question at issue. Such an examination clearly tends to discover the judgment debtor's property, and that fact is sufficient to justify the question asked in the case at bar, and all other similar questions.

Order reversed, with costs to appellants.

HALL, J., concurred.

CLEGG *v.* AIKEN ET AL.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, NOVEMBER, 1885.

§§ 3252, 3256.

Costs—Extra allowance, on what computed—When interest forms a part of recovery—Disbursements—Referee's fees.

Where a referee reported that the plaintiff in an action was entitled to recover from certain of the defendants a certain sum, with interest from a day named, an extra allowance granted the plaintiff by the court, should be computed upon the principal sum with interest added, and not upon the principal sum alone; the interest was a portion of the recovery. [1]

Sinne *v.* Mayor (8 *N. Y. Civ. Pro.* 252, *note*), distinguished. [1]

The prevailing party in an action is entitled to tax in his bill of costs, as disbursements, the fees of a referee before whom the case was tried, notwithstanding the same have not been actually paid to the referee, and the solvency or insolvency of such party cannot be taken into consideration upon the taxation. [2]

Where an order was entered by consent that a certain sum paid by each party to an action, for referee's fees and the stenographer's fees, should be taxed by the successful party as disbursements in the case, the defeated party cannot, on the adjustment of costs, question the amount of the referee's fees fixed in the order and admitted to have been paid. [3]

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Clegg *v.* Aiken.

Where the plaintiff and one of the defendants have been successful in an action, the successful defendant cannot tax in his bill of costs referee's fees included in the plaintiff's bill of costs. [4]

Where an order of reference entered by consent contained the following provision: "A stenographer shall be employed on the reference, each party paying one half his fees, and the successful party shall be allowed to tax the sum so paid as a disbursement in the case,"—*Held*, that the actual disbursements for stenographer's fees made by one of the several defendants, who was successful, should be allowed him. [5]

(*Decided November* 4, 1885.)

Motion by defendants for a new taxation of plaintiff's bill of costs, and by plaintiff for a new taxation of the defendant, The Aikens Newspaper Union's, bill of costs.

The action was brought to recover damages for the breach of a contract made by the plaintiff to publish in papers controlled by the defendants advertisements procured by the plaintiff at the lowest rates for which they published similar advertisements for other persons. The breach consisted in charging the plaintiff for inserting advertisements in such publications more than was charged other parties for like advertisements.

The cause was referred to B. C. Chetwood for hearing and determination, and the complaint by him dismissed. Subsequently, on October 15, 1883, an order was entered pursuant to a stipulation made by the parties to the action, vacating and setting aside the judgment entered, to such dismissal, and the order of reference to said B. C. Chetwood; directing "that it be referred to Hamilton Odell, Esq., to hear, try and determine the whole issues herein"; providing for the use of certain evidence taken on the former reference, and containing the following provisions as to disbursements:

"6th. That the amounts heretofore paid by the respective parties for referee's fees and stenographer's

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fees shall be taxed by the successful party as disbursements in the case.

"7th. A stenographer shall be employed on the reference, each party paying one half his fees, and the successful party shall be allowed to tax the sum so paid as a disbursement in the case."

The referee found in his report, as a conclusion of law: "That the plaintiff is entitled to recover a judgment in this action, against the defendants [naming certain of them] for the said sum of $10,998.15, with interest from the first day of May, 1876, amounting at the date of this report to the sum of $17,298.21"; that none of the counter-claims interposed by the defendants, of which there were several, had been sustained; and that the complaint should be dismissed as to the defendant, the Aikens Newspaper Union.

Other facts are stated in the opinion.

William Ford Upson, for plaintiff.

Philip Carpenter, for defendants.

LAWRENCE, J.—This action is bought by the plaintiff against eight defendants, and is an action upon a contract made by the common agent of all the defendants, except the Aikens Newspaper Union, with the plaintiff. The plaintiff succeeded in the action against all the defendants except said Aikens Newspaper Union, as to whom the complaint was dismissed. Two bills of costs were presented to the clerk for adjustment, one by the plaintiff and the other by the Aikens Newspaper Union, and from the adjustment made by the clerk this appeal has been taken.

[1] An extra allowance was granted to the plaintiff amounting to five per cent. upon the sum recovered. The referee reported that the plaintiff was entitled to judgment against the defendants other than the

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Aikens Newspaper Union for the sum of $10,998.15, with interest from the 1st day of May, 1876, amounting, at the date of the report, to the sum of $17,298.21. It was claimed by the plaintiff that the allowance should be computed upon the latter sum, and by the defendants that it should be computed upon the former sum, and the clerk sustained the defendants in this respect. The defendants rely upon the decision made by me in the case of Sinne *v.* Mayor, but I do not regard that case as in point. The action was brought by the plaintiff as administratrix to recover damages for causing the death of her husband, and the amount recovered was $4,500. It was claimed in that case that the allowance should have been based upon that sum, plus the interest thereon, allowed by section 1904 of the Code of Civil Procedure. But I held that the damages recovered were those awarded by the jury, and that the interest which was added by the clerk under section 1904 was not a part of the recovery within the meaning of section 3253 of the Code.* In this case, the amount of the interest is a

*As to basis for computing allowances in action for causing death, see NOTE ON EXTRA ALLOWANCES, *Ante*, pp. 238 *et seq.* The case of Sinne *v.* The Mayor has not been reported, and is therefore here given.

SINNE, AS ADMINISTRATRIX, ETC. *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, APRIL, 1881.

§§ 1904, 3253.

Extra allowance.—What is recovery in action for causing death.—Interest.—Disbursements.

In an action for damages for causing death, an extra allowance granted by the court should be computed on the amount awarded by the jury, and not on that sum plus the interest which the Code of Civil Procedure (§ 1904) directs the clerk to add thereto.

Where the decedent of the plaintiff in an action for damages for causing death, died in November, 1878, and the judgment was

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portion of the recovery, and the referee has specifically found that up to the time of his report the plaintiff is entitled to recover the sum of $17,298.21. I do not see how the principal sum can be separated

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recovered in the action by the plaintiff in 1881,—*Held*, that the interest which section 1904 of the Code of Civil Procedure provides shall be added to the verdict should be computed at the rate of seven per cent. up to January 1, 1880, and thereafter at the rate of six per cent.

In an action for causing death, the costs of a sketch of the scene of the accident, which was used on the trial and introduced in evidence, is properly disallowed on the taxation of costs.

(*Decided April* 1, 1881.)

Motion for a new taxation of costs.

The action was brought by the plaintiff as administratrix of her husband, who departed this life November 14, 1878, to recover damages for causing his death, which was alleged to have occurred through the neglect and default of the defendant. The action was tried in March, 1881, and a verdict rendered on the 24th of that month in favor of the plaintiff for $4,500. The court granted an allowance of two and one-half per cent. The plaintiff presented a bill of costs to the clerk for adjustment, in which was included interest on the verdict from the day of the death of the plaintiff's decedent to the time of the taxation of costs, at seven per cent.; also an extra allowance of two and one-half per cent. computed on the amount of the verdict plus such interest, and a charge of $5 for a sketch of the scene of the accident which had been used on the trial and introduced in evidence.

The clerk held that the interest which he was authorized by section 1904 of the Code of Civil Procedure to add to the verdict should be computed at the rate of seven per cent. per annum to January 1, 1880, and thereafter at six per cent., and that the allowance should be computed on the amount of the verdict alone, and reduced the amounts of those items accordingly. He also disallowed the charge for a sketch of the scene of the accident.

The plaintiff duly excepted, and forthwith made this motion.

M. M. Budlong, for plaintiff and motion.

William C. Whitney, counsel to the corporation, opposed.

LAWRENCE, J.—I think the taxation of the clerk was right, and it is, therefore, in all things affirmed.

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from the interest under these circumstances, and I am of the opinion that the total of principal and interest is the amount of the recovery. In the case against the city, above referred to, the interest was not a part of the verdict rendered by the jury. Under section 1904 of the Code, it was added to the sum awarded by the jury by the clerk. Here the interest is a part of the sum awarded by the referee sitting as judge and jury. I am of the opinion that the taxation by the clerk was erroneous in this respect, and that five per cent. should have been allowed upon the full amount of the recovery reported by the referee.

[*] As to the fees of the second referee, the taxation of the clerk was, in my opinion, correct. The plaintiff prevailed in the action and is entitled to tax those fees as disbursements, actual or prospective, and I do not think that because it is shown that the money has not been actually paid over to the referee that the taxation of those fees can be disallowed, there being no objection as to the amount of the fees taken by either party. Nor do I think that upon this taxation the solvency or insolvency of the plaintiff can be taken into consideration.

[*] I am also of the opinion that the clerk was right in allowing the item of $825, being the one-half of the fees of the first referee, which had been paid by the plaintiff. It was agreed between the parties in the stipulation presented to me, that each side had paid $825 to the first referee before the order of October 15, 1883, under which the second referee was appointed, was made. By that order it was expressly provided that the amounts theretofore paid by the respective parties for referee's fees and stenographer's fees shall be taxed by the successful parties as disbursement in the case. That order was entered by consent, and it is too late now—it being admitted that the payment

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of said sum was actually made—for the defendants to question the amount.

[ ] For the same reason, I am of the opinion that the stenographer's fees before the first referee should have been allowed by the clerk. The order of October 15 expressly provides for their payment. There seems, however, to be a discrepancy between the amount of these fees as stated in the stipulation and in the bill of costs. In the stipulation, the amount is stated as $1,138.72; in the bill of costs, as $1,367.97. In the absence of any other proof on the subject, the amount stated in the stipulation should be allowed.

[*] The clerk was right in striking from the bill of costs presented by the defendant, the Aikens Newspaper Union, the sum of $1,500 for fees of the second referee, inasmuch as they had been properly taxed in the plaintiff's bill. The actual disbursements for stenographer's fees made by the defendants, I think, should have been allowed, under the peculiar provision of the order of October 15, 1883. But as it does not appear that the whole of the sum sought to be charged was paid by the Aikens Newspaper Union, the clerk was right in not allowing that sum. Proof should be given of the actual amount expended by the Aikens Newspaper Union upon the readjustment, and the amount proved should be allowed.

Let the bills of costs be readjusted in accordance with these views.

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LABLACHE *v.* KIRKPATRICK AND ANOTHER.

CITY COURT OF NEW YORK, TRIAL TERM, NOVEMBER, 1885.

§ 66.

Attorney's lien for compensation—Enforcement of—Set-off when allowed, notwithstanding attorney's lien.

Where an action was brought on an undertaking given on procuring an injunction, by the defendant in the injunction against the sureties thereon, to recover the damages sustained by the plaintiff by reason of the injunction, a large portion of which damages consisted of counsel fees, and the defendants, in their answer, set up counter-claims exceeding in amount the plaintiff's claim, and the plaintiff in her reply, claimed that her attorneys had a lien upon the undertaking for their counsel fees for services in the action in which the undertaking was given, and it appeared that notice that such a lien was claimed had not been given the defendants, and that the costs of said action had been paid,—*Held*, that the lien of the attorneys did not prevent the counter-claim being set off against the plaintiff's cause of action;[5,6] that notice that the attorneys claimed a lien should have been given the defendants,[1] and the lien enforced in an action brought for that purpose by the attorneys.[5] *It seems*, that in such an action brought by the attorneys the counter-claim would be of no avail.[5]

Kipp *v.* Rapp (7 *N. Y. Civ. Pro.* 385), followed.[4]

Notice of an attorney's lien for his compensation is necessary where no lien is *expressly* given by statute.[1]

A plaintiff cannot, by his reply to a counter-claim set up in an answer, alter the cause of action stated in his complaint.[3]

(*Decided November* 6, 1885.)

Trial of action before the court without a jury.

The opinion states the facts.

Olin, *Rives* and *Montgomery*, for the plaintiff.

Arnoux, *Ritch* and *Woodford*, for the defendant.

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HALL, J.—In this action, tried by the court without a jury, the plaintiff seeks to recover upon an undertaking made by the defendants upon the granting of a preliminary injunction in the action of Mapleson v. Lablache in the superior court. The injunction was dissolved and the defendants [in that action] succeeded in the action, and recovered a judgment for costs, which was paid. The damages by reason of the injunction were duly ascertained and fixed at $333; for which sum plaintiff asks judgment in this action.

The defendants have not seriously contested the facts set forth in the complaint, but have set up in their answer and established a counter-claim for about the amount of plaintiff's claim, consisting of two judgments duly recovered against plaintiff and duly assigned to defendants before the commencement of this action.

The plaintiff in reply claims that a large portion of the claim of plaintiff was awarded to her for counsel fees in the superior court action and that the counsel have a lien on the undertaking for that amount, which is not subject to set-off.

It must be conceded at the out-set, that in the absence of any lien in favor of the attorney, the defendants are entitled to judgment upon their counter-claim.

The only questions to be determined are whether the plaintiff's attorneys have a lien upon the undertaking and the damages awarded under it for their services as counsel in the superior court action, and if so, whether such lien can be asserted and maintained by the plaintiff in this action or under the pleadings as presented.

Under section 66 of the Code of Civil Procedure, an attorney has a lien for his costs and compensation upon his client's cause of action or counter-claim, and in the absence of that or a similar statutory provision he would have no lien. In the superior court action the

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attorney for the defendants had no lien under the strict letter of the statute, for their client had neither a cause of action or counter-claim, but, under equitable constructions of the statute adopted by the supreme court in recent cases, having the complaint dismissed, they were entitled to a lien upon the judgment to the full amount of the costs and allowances, if any, and if the plaintiff in that action had held or purchased a claim against the defendants therein, and had attempted to set it off against the judgment for costs, the attorney's lien would have been superior and could not have been defeated. But no such attempt was made, and the costs were paid in full. The judgment, as entered, was for costs alone, and the entry of it was sufficient notice of the attorney's lien. This is the utmost extent to which the courts have gone. In order to reach that point, it was necessary to invoke the equity of the statute and give it a somewhat strained construction. With the trial and entry of judgment, the services of the attorneys in that action ceased; their costs were paid, and their lien extinguished.

The undertaking in said action, executed by the defendants as sureties, was a separate and distinct instrument given for the protection of the defendants in that action, and the attorneys were in no manner parties to or interested in that suit, and no liability attached to them until the dissolution of the injunction and termination of the action; and when the amount of their liability was ascertained, they had a right to pay it to the defendants in that action, and her discharge would have been a complete protection—at least in the absence of any direct notice of lien; and if, instead of paying her, they had discharged to her an equal or superior claim, I see no reason why that should not have operated with equal force to extinguish the debt.

The undertaking was on file, and, having been

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given as a protection to the defendants in that action, and for her benefit, she had a right of action upon it for her damages, and the fact; that a part of such damages were awarded to her for counsel fees, does not deprive her of the right; she could have employed attorneys other than those who acted for her in that action to prosecute a suit upon the undertaking, and if she had done so, it cannot be seriously claimed that a judgment could be rendered in her favor for the amount of the claim of her former attorneys, including the costs of such action, in the face of the counter-claim set up by defendents.

[1] It does not appear in evidence that the plaintiff is insolvent or unable to pay her counsel for service rendered in the former action, nor has any notice of lien been served upon defendants, which was certainly necessary where no lien was expressly given by statute; and if the attorney had such lien, it might, in the absence of such notice have been taken that they had waived the lien and looked to their client for compensation.*

But what appears to me to be an unanswerable argument for defendant in the action is the fact that the action is commenced in the name Emilia Lablache, and the complaint is verified by one of the attorneys, and it sets forth that plaintiff has been damaged, and her damages have been assessed, and demands judgment in her favor, and no suggestion of any lien is made. The defendant owned a claim against plaintiff for an amount about equal to her claim, and they only ask that, so far as it will go, that it be appropriated to pay her damages. This they had a clear right

[2] to do, and, under well-settled rules of law. The claims became set off in fact the moment the

* See Coster v. Greenpoint Ferry Co., 5 *N. Y. Civ. Pro.* 146, aff'd without opinion, 98 *N. Y.* 660.

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amounts existed together, and the action of the court is needed only to determine the validity and amount of the respective claims and declare the result.

[*] The reply of plaintiff asserting the lien of the attorneys could not alter the cause of action as stated in the complaint the defendants had a right to answer it as they found it, and any defense or counter-claim which was good against it when served would be equally good notwithstanding the reply.

The reply in reality amounts to a statement by plaintiff that some one else owns a part of her claims as set forth in the complaint, and is to that extent a contradiction of the allegations of the complaint. She might with equal force allege in reply that she had, before she commenced the action, assigned her claim. The attorneys for plaintiff undoubtedly have a lien upon her cause of action for their costs and counsel fees in this action, but the defeat of the cause of action defeats the lien.

[*] The case of Kipp *v.* Rapp,* recently decided in this court by Ch. J. McAdam, is an authority directly in point. The action was upon an undertaking for costs on appeal to the court of appeals, and was brought in the name of the plaintiff in the undertaking; the defense was that the plaintiff had, before the commencement of the action, assigned his claim to the costs to a third party. On the trial the assignment was admitted, but the attorney claimed a lien upon the undertaking for the full amount of the costs; but the justice dismissed the complaint, holding that as the action was brought in the name of plaintiff in the former action, and he had assigned his claim, he, at least could not recover. The attorney in that case at once commenced an action in his own name, claiming to be the equitable owner and assignee of the under-

* Reported, 7 *N. Y. Civ. Pro.* 385.

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taking by virtue of his lien for costs, which action is still pending, and it may be said that such a form of action is not infrequent in this court.

[*] If the attorneys in this action had commenced an action in their own names and had established an equitable assignment of the undertaking by notice of any lien for costs or counsel fees, whatever other defense could have been made, the counter-claim against this plaintiff would have been made of no avail.

[*] But suppose plaintiff was allowed to recover $233, the amount of her counsel fees and the costs of their action, the judgment would be read merely as a money judgment, and would still be in her name, and she would be entitled to assign it subject to the lien of her attorneys for costs and counsel fees in this action. But in that case there would have to be judgment in favor of defendants against plaintiff for their entire counter-claim less $100, and also for costs and allowances, and we should be confronted with the singular anomaly of two judgments in one action at law—one in favor of the plaintiff and the other in favor of the defendants, and each recovering costs against the other; and even if this impossible state of things could exist, the judgments would offset each other, and precisely the same question might again arise, complicated by the liens of the judgments respectively.

I have made a computation of the amount of plaintiff's claim and interest, as stated in the complaint, and find it to be $349.26, while the defendant's counter-claim and interest, as claimed in the answer, amount to $344.06.

Judgment must therefore be rendered establishing defendant's counter-claim, and awarding judgment in favor of the plaintiff for $5.19.

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HOWARD *v.* CURRAN AND ANOTHER.

SUPREME COURT, SECOND DEPARTMENT, KINGS COUNTY SPECIAL TERM, NOVEMBER, 1885.

§§ 500, 523.

Amended answer—When plaintiff required to accept.

Where, in an action to charge real property with the debts of a decedent, infant defendants, appearing by their guardian *ad litem*, serve an answer alleging "that they are strangers to all and singular the matters and things in the . . . complaint set forth; that they . . . are infants . . . . and claim such interest in the premises as they are entitled to, and submit their rights and interests . . . to the protection of the court;" but raising no issue, and the same was retained by the plaintiff's attorneys, who noticed a motion for judgment thereon, and thereafter, and before the hearing of such motion, and within twenty days from the service of the first answer, the defendants served an amended answer of which the plaintiff's attorneys gave an admission of due service, and on the following day returned on the ground that it was not served in time, and was defective in form, in that it was not the answer of the guardian *ad litem*, and claimed that the answer first served was not an answer,—*Held*, that a motion that they be required to accept service of such amended answer should be granted.

(*Decided November* 21, 1885.)

Motion that the plaintiff be required to accept an amended answer served herein.

The action was brought to charge a certain note made by one H. M. Curran, the father of the defendants, now deceased, upon certain real property situate in the city of Brooklyn, alleged to have been owned by him in his life-time and to have descended to the defendants as his heirs at law.

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The defendants are both minors, and appeared herein by a guardian *ad litem*, and served on October 27, 1885, an answer, which, omitting the title and signatures read as follows:

"The defendants above named, jointly and severally answering, by John S. Davidson, their guardian *ad litem* the complaint of the plaintiff above named, allege that they are strangers to all and singular the matters and things in said complaint set forth; that they, the said defendants, are infants, under the age of twenty-one years, and claim such interest in the premises as they are entitled to, and submit their rights and interests in the matter in question in this action to the protection of the court."

The plaintiff gave notice of a motion for judgment on this answer, and thereupon, on November 16, 1885, and within twenty days from its service, the defendant served an amended answer, due service of which was admitted by the plaintiff's attorneys. On the next day they returned it with the following notice indorsed thereon.

"MESS. ATKINS & BENEDICT.

"Gentlemen: We return within paper upon the ground that the time to answer expired on the 9th day of November; that no extension of the time to answer has been had, and no other answer has heretofore been served; and upon the further ground that the answer purports to be an answer of the infant and not of the guardian *ad litem*.

"Yours, &c.

SILKMAN & SEYBEL, Plff's Attys."

The defendant thereupon made this motion. The amended answer so returned purported to be the answer of the infant defendants, reading the same as

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the original answer, down to the word "allege;" it put in issue the allegations of the complaint, and was verified by the guardian *ad litem.*

Russell Benedict (*Atkins & Benedict*, attorneys), for the defendants and motion.

The only theory on which the plaintiff's objection that the amended answer was not served in time can rest, is that no original answer had been served in the case. To establish this, it becomes necessary to ignore absolutely the general answer of the infant defendants, served October 27, 1885. . . . . The practice of serving such answers has long been permitted by the courts in proper cases and is distinctly recognized by the present Code of Civil Procedure, which provides that such answers need not be verified. *Code of Civil Procedure*, § 523. . . . . If it had been the plaintiff's intention to treat the original answer as defective, she should have promptly returned it, with notice of the supposed defects. . . . If the original answer was a pleading sufficient to answer plaintiff's purpose in moving for the judgment, it was a pleading for all purposes. The fact that the plaintiff moved for judgment before the service of the amended answer can in no wise prejudice the defendants' right to amend of course within the time allowed by law; the motion previously made abates upon the amended pleading being served. Frank *v.* Bush, 2 *N. Y. Civ. Pro.* 250; Spuyten Duyvil R. R. Co. *v.* Williams, 3 *N. Y. Monthly Law Bul.* 81. . . . . Where a party admits due service of a notice or pleading he is precluded from objecting to want of full notice or timely service, even though it be affirmatively shown that reasonable notice was not given. Talman *v.* Barnes, 12 *Wend.* 227. . . . . The form of the answer as amended is correct; all "the allegations and denials of a verified pleading must in form be stated to be made by the party plead-

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ing"—*i. e.*, the infant defendants. See *Code Civil Procedure*, § 524.

Joseph Fettritch (*Silkman & Seybel*, attorneys), for plaintiff, opposed.

An answer must specifically deny some material allegation of the complaint. *Code Civ. Pro.* § 500. The paper served. . . . October 27, is not an answer because it does not deny anything material, or immaterial. It is nothing more than notice that defendants were infants, and that the court must, in the reference to which the plaintiff was entitled, see that all the facts alleged in the complaint are proved.

CULLEN, J., granted the motion, and an order was entered, November 25, 1885, the adjudicatory part of which was as follows:

"Ordered, that the said plaintiff receive the amended answer heretofore served upon her in this action, if served anew, together with a copy of this order, within five days after entry of this order; or that, upon her refusal so to do, such amended answer stand as the answer in this cause, and as duly served on the 16th day of November inst.; and it is further ordered, that the defendants and their guardian *ad litem* accept short notice of trial for the December special term of this court."

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BULLEN, APPELLANT, *v.* MURPHY, RESPONDENT.

CITY COURT OF BROOKLYN, GENERAL TERM, NOVEMBER, 1885.

§§ 549, 550, 1487.

Execution against the person—Instance of case in which it may be issued although an order of arrest was not granted and executed—Former motion.

An action to recover moneys delivered by the plaintiff to the defendant as her trustee, to be deposited in bank for her and returned to the plaintiff on demand with interest, which the defendant, after having deposited as agreed, drew from the bank but failed and refused to pay to the plaintiff, is an action for the wrongful conversion of personal property, and an execution may be issued against the person of the defendant, on a judgment recovered by the plaintiff in the action, notwithstanding an order of arrest has not been obtained and executed against the defendant.

Where the fact that a motion for leave to issue an execution against the person was made and denied before one was issued, was urged as a reason why the motion to set aside an execution issued against the person should be granted, and it did not appear on what grounds the motion was denied,—*Held*, that as such a motion was unnecessary it will be assumed that it was denied for that reason.

It seems, that an execution cannot be issued against the person of a defendant on a judgment for moneys received in a fiduciary capacity, unless an order of arrest has been obtained and executed in the action.

(*Decided November* 23, 1885.)

Appeal from order denying motion to set aside an execution issued against the person of the defendant.

The plaintiff recovered judgment in this court against the defendant, on November 24, 1884, and thereafter, the judgment having been duly docketed, issued an execution against his property to the sheriff of the

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city and county of New York. That execution was returned wholly unsatisfied, and subsequently the execution now sought to be set aside was duly issued.

Other facts appear in the opinion.

John P. Hudson, for defendant-appellant.

Edward F. Brown, for plaintiff-respondent.

CLEMENT, J.—An execution was issued against the person of the defendant, and by an order at special term, the same was vacated, from which order this appeal was taken. No order of arrest was obtained before judgment, and the question to be decided is whether this action was for moneys received in a fiduciary capacity.

If the action was for the wrongful conversion of personal property then the execution was properly issued (*Code of Civil Procedure*, § 549). On the other hand, if the action was for moneys received in a fiduciary capacity, the order vacating the execution should be affirmed, for the reason that no order of arrest was obtained prior to judgment (*Code of Civil Procedure*, § 550, subd. 3).*

The plaintiff alleged as follows in his complaint: "First. That plaintiff and defendant are residents of the city of Brooklyn, county of Kings, and State of New York.

"Second. That between July 15, 1868, and October 12, 1874, at the said city of Brooklyn, the plaintiff paid and delivered to the defendant, as her trustee, various sums of money, amounting in all, exclusive of interest, to the sum of $796, which said sums of money defendant accepted and agreed to deposit in bank in trust for

* See Segelken v. Meyer, Ct. of Appeals, 1883, 5 *N. Y. Civ. Pro.* 1, 13, and cases there cited; Segelken v. Meyer, Supm. Ct. Kings Sp. Term, 5 *Id.* 258. See also, Smith v. Duffy, *ante*, p. 191.

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plaintiff, and to return the same to plaintiff with interest, on demand.

"Third. That defendant did so deposit said sums of money in trust for plaintiff in the Emigrant Savings Bank of Brooklyn, and that the principal and interest amounted to $1,055.25, all of which defendant drew out of said bank between May 21, 1869, and January 23, 1879, and kept, retained and converted the same to his own use.

"Fourth. That plaintiff has since duly demanded said principal sum of $796, together with the interest $259.25, amounting in all to the sum of $1,055.25, from defendant, but no part thereof has been paid except the sum of $64.50, which defendant has paid plaintiff on account between January 1, 1876, and January 1, 1879, and defendant still neglects and refuses to pay the same."

It must be assumed that it was adjudicated by the judgment on which the execution was issued, that the sums of money in the Emigrant Savings Bank were deposited in trust for plaintiff, and that the defendant drew them out of the bank and expended them for his own use, and on demand refused to return them to plaintiff.

The defendant could draw the deposit out of the bank to return the same to plaintiff; but when he received the money the law required that he should hold the same separate from other property.

The fund, when in the bank, and after it was drawn out, was the property of the plaintiff.

The two acts of the defendants,—viz., the withdrawal from the bank, and the failure to pay over,—taken together, amount to a conversion, for which the action was brought.*

* For a case in which money deposited with the defendant was held not to have been converted, see Graeffe v. Currie, *ante*, p. 187.

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The case of Smith *v.* Frost (70 *N. Y.* 71) seems in point. It is there held that a trustee who obtains possession of property belonging to the *cestui que trust* and refuses to deliver such property on demand at the expiration of the trust, is liable for a conversion.

It is contended that an application had been made to the special term for leave to issue the execution against the person and that the motion was denied. No order is produced, and we cannot tell the grounds of the denial. It was not necessary to obtain leave, and we may therefore assume that the motion was denied for that reason.

The order appealed from must be reversed, with $10 costs and disbursements, and the motion to vacate the execution denied.

REYNOLDS, Ch. J., concurred.

SCOTT ET AL., RESPONDENTS, *v.* REED, IMPLEADED, &C., APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, OCTOBER, 1885.

§ 550, subd. 2.

Order of arrest.—Proof of disposition or intent to dispose of property for purpose of defrauding creditors.—Fact that partner has done so, will not sustain order of arrest.

To entitle the plaintiff, in an action to recover for goods sold and delivered, to an order of arrest, on the ground that the defendants had, since making the purchases, received or disposed of their property, or were about to do so, with intent to defraud their creditors, fraudulent conduct of that description must be sustained against the person to be arrested, and will not be proved simply by showing such misconduct on the part of his partner.[1]

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Scott *v.* Reed.

Proof that a defendant has withdrawn a large sum of money from the business of the firm of which he was a member, because it had suffered severe losses, and his partner had transferred a large portion of his property to his wife without consideration, will not sustain an order of arrest granted on the ground that he had disposed of, or was about to dispose of his property with intent to defraud his creditors. It cannot be inferred from these facts that the defendant had disposed of any part of this sum of money, or that he intended to do so, to defraud any of his creditors, and without that inference being supported, the plaintiff was not entitled to an order of arrest.[2]

Hitchcock *v.* Peterson (14 *Hun*, 389), distinguished.[3]

To entitle a party to an order of arrest, a reasonably plain case must be made out.[4]

(*Decided, October* 9, 1885.)

Appeal by defendant Reed from an order denying a motion to vacate an order of arrest.

Sufficient facts appear in the opinion.

James M. Smith, for appellant.

F. N. Bangs, for respondent.

DANIELS, J.—The order was made under the authority of subdivision 2, section 550 of the Code of Civil Procedure. The application for it depended wholly upon affidavits, one of which was devoted to proof of the indebtedness in this action, and of other indebtedness owing by the defendants, who has appealed, and his copartner. By the other affidavit it was stated that the partner of the appellant had informed the person making it, that the apellant had withdrawn $4,800 in cash, being the larger portion of his capital, from the firm, and had concealed its withdrawal by false entries made by himself in the copartnership books. This statement was communicated to Reed, the appellant, who admitted that he had withdrawn this amount from the funds of the firm, but excused himself for

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doing so by the statement that losses had been suffered in the business, and that his partner Atwater had transferred a large portion of his property to his wife without consideration. From this statement, and a statement exhibiting the financial condition of the firm to a mercantile agency, the conclusion was drawn by the persons making the affidavit that both defendants, since the making of their purchases, had removed or disposed of their property, or were about to do so, with intent to defraud their creditors. And the latter part of the statement made by the appellant, as it was further sustained by the information received from Bradley, showing the transfer of corporate stock by Atwater to his wife, may have been sufficient to support an order for his arrest on this ground against Atwater, but the fact that he may have disposed of his property to defraud his creditors, or the creditors of the firm, will not support an order for the arrest of his copartner Reed.

[1] To entitle the plaintiff to such an order, the law requires that the charge of fraudulent misconduct of the alleged description shall be sustained against the person to be arrested, and that will not be proved simply by showing such misconduct on the part of his partner (National Bank of Commonwealth *v.* Temple, 39 *How. Pr.* 432; Hathaway *v.* Johnson, 55 *N. Y.* 93; Sherman *v.* Smith, 42 *How. Pr.* 198).

[2] But neither of the affidavits establishes the fact that any fraudulent disposition was made or intended by Reed. All that has been proved against him is that he drew this amount of money from the business of the firm for the reason that it had suffered severe losses, and his partner Atwater had already transferred a large portion of his property to his wife without consideration. It cannot be inferred from these facts, without further proof, that Reed had either disposed of any part of this sum of money, or that he

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intended to do so—to defraud any of his creditors; and without that inference being supported, the plaintiff was not entittled to an order for his arrest

[*] (Hoyt *v.* Godfrey, 88 *N. Y.* 669). In this respect the case is distinguished from Hitchcock *v.* Petersen (14 *Hun*, 389), where positive fraud was found to be sustained against both of the defendants.

[*] To entitle a party to an order of arrest, a reasonably plain case must be made out. That has been so frequently held as to require no reference to the authorities supporting the principle. Such case was not made out against the defendant Reed; and the order from which the appeal has been taken should be reversed, with $10 costs, and also the disbursements, and an order made vacating the order of arrest.

DAVIS, P. J., and BRADY, J., concurred.

ROSS, RESPONDENT, *v.* WIGG, APPELLANT.

COURT OF APPEALS, 1885.

§§ 1296–1299.

Appeal.—Who is person aggrieved.—When cannot be taken by one not a party.—Substitution of person interested, when not ordered.

Where, pending an appeal to the general term from an order denying a motion to vacate an attachment, a receiver of the property of the defendant in the attachment was appointed in proceedings supplementary to execution, instituted by a stranger to the attachment suit, and such defendant thereafter consented to the entry of judgment against him in the attachment suit, and an order was entered, on like consent, dismissing the appeal, and thereafter, notwithstanding the entry of such order, the general term affirmed the order denying the motion to vacate the attachment, and an order

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of affirmance was duly entered,—*Held*, that the receiver was not entitled to appeal from such order of affirmance, nor to be substituted in place of the defendant;[1,2,3] that the remedy of the receiver, if he had any, was under section 682 of the Code of Civil Procedure,—which provides for a motion by one who has acquired an interest in or lien upon attached property, subsequent to an attachment, to vacate the attachment,[4] or by a judgment creditor's action to set aside the judgment as collusive.[7]

In such a case, the court has no power to strike out the name of the defendant and substitute that of the receiver, without the plaintiff's consent,[4] and the defendant has a right to be upon the record in his own name, and to defend the action if he thinks proper, or, if not, to consent to any disposition of it to which the parties can agree.[6]

Before a person can be said to be aggrieved by an adjudication, within the meaning of section 1296,—which provides for appeals in certain cases from orders or judgments, by "a person aggrieved" who is not a party,—it must have some binding force against his rights, his person or his property, and the fact that an order remotely affects interests which he represents, will not give one, not a party, a right to appeal therefrom.[2]

It seems, that section 1296 of the Code of Civil Procedure,—providing for an appeal by a person aggrieved by an adjudication who is not a party,—contemplates mainly, if not exclusively, cases in which the party to the record is merely a nominal one, and the real party in interest is the one aggrieved, or where pending the action there has been a devolution, by death or otherwise, of the entire interests or property involved in the litigation to some other person, who thereby became the party aggrieved.[5]

(*Decided October* 27, 1885.)

Motion by respondent to dismiss appeal; also, motion by one Dowdle, receiver of the nominal appellant, to be substituted, as a party in his place.

The facts are fully stated in the opinion.

N. C. Moak, for receiver, appellant.

W. H. Kenyon, for plaintiff-respondent.

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EARL, J.—On March 7, 1884, an attachment and order of arrest were granted in this action, and they were executed on the day following. On March 19, the defendants obtained an order to show cause why the attachment and order of arrest should not be vacated. That motion was denied, and on March 24, Christie and others obtained a judgment against the defendant. On March 28, the defendant appealed from the order refusing to vacate the attachment and order of arrest, to the general term. On April 29, supplementary proceedings were commenced by Christie and others, upon their judgment, which resulted in the appointment of Dowdle as receiver of the defendant's property on June 4. On June 27, the appeal from the orders refusing to vacate the attachment was argued at the general term. On July 12, the defendant personally, without the presence of his attorney, offered judgment for the entire amount claimed by the plaintiff against him; at the same time stipulating that an order should be entered dismissing the appeal to the general term on filing the stipulation without further notice; and on July 14, an *ex parte* order to that effect was entered in the office of the county clerk of Oswego county. On the same day, plaintiff's attorney accepted defendant's offer of judgment, and perfected judgment for the full amount claimed. The general term subsequently affirmed the order of the special term, notwithstanding the order dismissing the appeal.* On August 25, 1885, an order of affirmance was entered by Dowdle, receiver, and defendant's attorney, and on the 29th of the same month, the attorney and the receiver appealed in the name of the

* The opinions of the general term written on making this determination, are reported *sub nom.* Ross v. Wigg, 6 *N. Y. Civ. Pro.* 263; that of the special term, on granting the order then affirmed, 6 *Id.* 268, *note.*

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defendants to this court. This motion is made to dismiss such appeal and we think it should be granted.

It is not disputed that the appeal is without the authority of the defendant and is brought by the receiver alone, who is not a party to the action. It is claimed, however, that the receiver was entitled to appeal under section 1296 of the Code, which provides that "a person aggrieved who is not a party but is entitled by law to be substituted in place of a party; or who has acquired since the making of the order or the rendering of the judgment appealed from, an interest which would have entitled him to be so substituted, if it had been previously acquired, may also appeal as prescribed in this chapter for an appeal by a party. But the appeal cannot be heard until he has been substituted in the place of the party; and if he unreasonably neglects to procure an order of substitution the appeal may be dismissed upon motion of the respon-
[1] dent." This case is not within that section. We have great doubt whether the receiver is an aggrieved party. He is in no way bound or affected by the order from which he has brought the appeal. That order simply affirms an order previously made, to
[2] which he was not a party. The fact that it may remotely or contingently affect interests which he represents does not give him a right to appeal. Before a person can be said to be aggrieved, within the meaning of that section, by an adjudication, it must have binding force against his rights, his person or his property.
[3] But before one, not a party, can claim the right to appeal, he must not only be aggrieved, but he must be entitled to be substituted; and it is clear that the receiver was not entitled to be substituted in the place of the defendant. We know no principle or rule of law which would authorize any court to strike the name of the defendant from the record against the will of the plaintiff and substitute in its place the

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name of the receiver. The plaintiff was entitled to retain his judgment against the defendant for what it was worth and enforce it against him if he could.

[*] Section 1296 contemplates cases mainly, if not exclusively, where the party to the record is merely a nominal one, and the real party in interest is the one aggrieved because he is the real party, or where, since the commencement of the action, there has been, by death or some other way, a devolution of the entire interest, or property involved in the litigation, to some other person, who has thus become the party

[*] aggrieved. The defendant, too, had a right to be upon the record in his own name, and to defend the action if he thought proper, and if not, to consent to any disposition of it to which the parties could agree.

[*] The remedy of the receiver, if he had any, was under section 682 of the Code,—which provides that a person who has acquired a lien or interest in attached property, after its attachment, may at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, apply to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative. Or if the judgment in this action and the subsequent proceedings have been collusive and fraudulent with intent to defraud the honest creditors of the defendant, the receiver may institute an equitable action to set them aside.

We are, therefore, of the opinion that this motion should be granted, with costs of appeal to this court and $10 costs of the motion.

[*] The view thus far expressed also disposed of the motion on behalf of the receiver to be substituted in the place of the defendant, under the section 1299 of the Code,—which provides that where on appeal

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from one Court to another an application for an order of substitution is permitted in the last three sections, it shall be made to the appellate court. As he was not entitled to be substituted under either of the sections named, the motion must be denied with $10 costs.

All concurred.

THE J. G. HOFFMAN MANUFACTURING COMPANY *v.* READ, AS ADMINISTRATOR, ETC., IMPLEADED, &C.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, MARCH, 1885.

§§ 544, 760.

Supplemental complaint.— When demurrer to, not frivolous.*

Where a defendant died intermediate the trial and decision of an action, and an order was granted reviving the action against the defendant's administrators, and a supplemental complaint was served, setting forth the trial, the death of the defendant and appointment of his administrator, and that the justice before whom the case was tried had, after the death of the original defendant, determined it in favor of the plaintiff, but containing no allegations showing the nature of the cause of action, or that it was one that survived,— *Held*, that a demurrer to the supplemental complaint on the ground that it did not state facts sufficient to constitute a cause of action was not frivolous.

(*Decided March* 19, 1885.)

Motion by plaintiff for judgment upon defendant's demurrer to a supplemental complaint served herein, as frivolous.

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* See Note on Supplemental Pleadings, treating the subject generally, 5 *N. Y. Civ. Pro.* 328.

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The action was originally brought against the defendant John R. Rowland and one Henry F. Read, to compel the assignment of certain letters-patent to the plaintiff and to recover damages for their failure so to do. Issue was duly joined, and the action was tried at special term before Hon. C. H. VAN BRUNT, on December 11, 1884, who on January 16, 1885, rendered his decision in favor of the plaintiff and against the defendant.

January 14, 1885, the defendant Henry F. Read died intestate, and on the twentieth of the same month letters of administration were issued to the present defendant Charles P. Read, who thereupon duly qualified as administrator. On February 13, 1885, the plaintiffs procured an order continuing the action against said Charles P. Read, as administrator, etc., of Henry F. Read, deceased, and substituting him as a party defendant in the place of said decedent, and allowing the service of a supplemental summons and complaint herein.

A supplemental summons was thereafter, on February 14, 1885, duly served on said administrator, together with a supplemental complaint, which, omitting its title and signature, was as follows:

"In and by this supplemental complaint which is served under and pursuant to an order of this court, dated February 13, 1885, the plaintiff above named, The J. G. Hoffman Manufacturing Company, by Edward S. Hatch, its attorney, complains of the above named defendants John R. Rowlands and Charles P. Read, as administrator of the goods, chattels and credits of Henry F. Read, deceased, and alleges, upon information and belief, as follows:

"First. That this action was tried before Honorable CHARLES H. VAN BRUNT, one of the justices of this court, without a jury, on December 11, 1884, and on

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January 16, 1885, the said justice rendered this decision in favor of the plaintiff and against the defendants.

"Second. That Henry F. Read, who was one of the original parties defendant; in this action died on or about January 14, 1885, and after said trial and before said decision was rendered, intestate.

"Third. That letters of administration upon the estate of said Henry F. Read were duly issued on January 27, 1885, by the Surrogate of the County of Kings who had jurisdiction in the premises, to the defendant Charles P. Read, who has duly qualified and entered upon the discharge of his duties as such administrator.

"Wherefore the plaintiff demands judgment against the defendants John E. Rowlands and Charles P. Read as administrator of the goods, chattles and credits of Henry F. Read, deceased, and any and all persons claiming an interest in or to letters patent No. 300, 285, or the application for letters patent upon the further improvements in the driving mechanism for fan blowers referred to in the original complaint in this action; that they and each of them execute and deliver to this plaintiff a good and proper assignment of said letters patent, and surrender to this plaintiff, his or their evidences of title thereto; and that the said John R. Rowlands and Charles P. Read administrator of the goods, chattles and credits of Henry F. Read, deceased, pay to this plaintiff the sum of $5,000 as damages with its costs and disbursments of this action."

Said administrator thereafter, on March 6, demurred to said supplemental complaint on the ground that it did "not state facts sufficient to constitute a cause of action" and the plaintiff thereupon made this motion.

Edward S. Hatch, for plaintiff and motion

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William H. Williams, for defendant, opposed.

Cited, in support of contention that the demurrer being founded in reason was not frivolous: Cook *v.* Warren, 88 *N. Y.* 37 Beal *v.* Union Paper Co., 4 *N. Y. Civ. Pro.* 19; Wyckoff *v.* Andrews, 5 *Id.* 410; in support of proposition that the cause of action should have been set forth in the supplemental complaint, and therein shown to be one which survived: Allen *v.* Walter, 10 *Abb. Pr.* 379; Phelps *v.* Sproule 4 *Simons* (*Eng. Chan.*) 318; Harris *v.* Pollard, 3 *Piere Williams* (*Eng. Chan.*) 348; 2 *Barb. Chancery Prac.* (2 Rev. ed.) 46, 47; *Story's Eq. Pleadings*, § 343; *Cooper's Eq. Pleadings*, 72; Griffith *v.* Ricketts, 3 *Hare* (*Eng. Chan.*) 476; *Moak's Van Santvoord's Pleadings*, 269; 2 *Whittaker's Prac.* (2 ed.) 205.

VAN BRUNT, J.—Motion denied, with $10 costs to abide final event.

BONNELL *v.* GRISWOLD.

SUPREME COURT, THIRD DEPARTMENT, SARATOGA COUNTY, SPECIAL TERM, MAY, 1885.

§§ 755, *et seq.*

Abatement—when action for penalties survives and may be revived.

An action to enforce the personal liability of a trustee of a corporation for its debts, for failure to file annual report and for making a false report, does not abate on the death of the plaintiff, but may be revived and continued by his personal representative. The debt is assignable and an assignee of the debt takes, as an incident thereof, the right to the penalty; an administrator or executor is deemed, in law, to be the assignee of the assets of the estate, which he represents.

(*Decided May*, 1885.)

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Motion by plaintiff's personal representative to revive and continue action.

The action was brought to recover penalties alleged to have been incurred by defendant, for violating certain provisions of chapter 40, of the Laws of 1848, authorizing the formation of manufacturing corporations—consisting (1) of a failure, while trustee of a manufacturing corporation, formed under that act, to make and file the annual report required by section 12 thereof; (2) of the making of a false report, within the meaning of section 15 of said act; and (3) of conspiring to fraudulently form a bogus corporation under said law.

Other facts are stated in the opinion.

A. Pond, for the motion.

William C. Holbrook, opposed.

Bockes, J.—Motion to revive and continue the action by and in the name of the personal representative of the plaintiff, who has died since its trial and when the case was in the hands of the trial judge for decision.

The action was by Bonnell, sole plaintiff, against Griswold and others, to recover against them for penalties imposed by section 12 of chapter 40 of the laws of 1848 and amendments thereof. The plaintiff having died, revivor and continuance of the action are now asked for by his administrator. The answer to the motion is this: that the action being for penalties imposed by statute, abated by the plaintiff's decease. The death of a defendant in such an action would produce an abatement of it as to such deceased party (Stokes *v.* Stickney, 96 *N. Y.* 323), and as was held in Reynolds *v.* Mason (54 *How. Pr.* 213; S. C., on appeal,

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6 *N. Y. Week. Dig.* 531), a like result would follow by the death of the plaintiff. It seems that the affirmance in the last case was but solely upon the doctrine of the previous decision in the Bank of California *v.* Collins (5 *Hun*, 209), which, unlike the present, was a case where revivor and continuance were asked for against the executor of a deceased defendant, as in Stokes *v.* Stickney.

In Carley *v.* Hodges (19 *Hun*, 187), the decision in the Bank of California *v.* Collins was not deemed applicable or controlling in a case like the present, and it was held in the former case, that the right of action survived to the executor of the deceased creditor. The question now before me arising upon the decease of a plaintiff does not seem to have been authoritatively decided, unless we accept Carley *v.* Hodges as decisive of it. As a necessary inference it would seem to follow from many decisions that the action may be continued by and in the name of the personal representative of the deceased plaintiff.

Actions based upon a claim that is assignable may be thus revived and continued; and an assignment of such claim against the company would carry a right of action to the assignee for the penalty imposed by section 12 of the Act of 1848 (Pier *v.* George, 86 *N. Y.* 613; Bolen *v.* Crosby, 49 *Id.* 183; Hoag *v.* Lamont, 60 *Id.* 96). So in Stokes *v.* Stickney (96 *N. Y.* 323, above cited). It is said that the statute of 1848, provided for this cause of action, gives it to the creditors of the corporation, and the debt itself being assignable, it follows that who ever becomes the owner thereof, takes as the incident thereof the right to the penalty, and is by the terms of the statute, entitled to maintain the action (page 327). This, too, is the doctrine of the decision in Carley *v.* Hodges (19 *Hun*, 187, above cited).

Now the administrator of the deceased plaintiff, as

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such, has become the owner of the claim against the corporation, which claim constitutes the foundation of the right of action, with the incident thereof, to wit, the right to the penalty; and, again, quoting from Stokes *v.* Stickney, "is by the terms of the statute entitled to maintain the action." Indeed an administrator is deemed in law to be the assignee of the assets of the estates which he represents. Judge DENIO, says, in Zabriskie *v.* Smith (13 *N. Y.* 333): "An administrator represents the person deceased and is in law his assignee."

In view of these decisions, in the court of appeals, I think, I must hold that this action may be revived and continued by and in the name of the administrator of the deceased plaintiff.

Motion granted.

DONOVAN, RESPONDENT, *v.* CORNELL, APPELLANT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM, DECEMBER, 1885.

§§ 549, 550.

Arrest.—When right to, depends upon facts extrinsic to the cause of action.—Instance.

An action to recover from a commission merchant the proceeds of goods consigned to him for sale, and sold by him, less his commission for selling them, is an action on contract, and an allegation in the complaint of the conversion of the proceeds of the sale is mere surplusage, and would on the trial be disregarded.[1,2] LARREMORE, P. J.,—(dissenting), *held*, that the action was for conversion.[3]

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Donovan v. Cornell.

A ground of arrest based upon a claim, that the defendant in such an action, acted in a fiduciary capacity, would be extrinsic to the cause of action, and need not be alleged in the complaint; and if so alleged, need not be proven, and the person of the defendant on a recovery against him, would not be subject to an execution, if an order of arrest was not granted in the action.[1,4]

Segelkin v. Meyer (5 *N. Y. Civ. Pro.* 1) followed.[1,2]

In such a case, the cause of action and the cause of arrest are not identical, and it is the duty of the court on a motion to vacate an order of arrest, to decide upon the pleadings and affidavits whether a fiduciary relation existed between the plaintiff and defendant, and not leave that question to be determined by the jury; the jury upon the trial of the action will not have to pass upon the questions involved in the arrest of the defendant.[2,3,4]

Where the city court of New York refused to hear a motion to vacate an order of arrest on the merits, on the ground that the cause of action and cause of arrest were identical, and that, therefore, the right to arrest would be weighed and determined by the jury on the trial of the cause,—*Held*, that the order denying the motion affected a substantial right, and an order affirming it was appealable to the New York court of common pleas.[3,5]

(*Decided December* 7, 1885.)

Appeal from order of general term of city court of New York, affirming order of the special term denying motion to vacate order of arrest.

The complaint alleged "that between March 30, 1885, and April 3, 1885, both inclusive, this plaintiff delivered to the above named defendant, who during that time was a commission merchant, one hundred and seventy-seven sheep and lambs, to be, by said defendants, sold for this plaintiff for cash, and after deducting said defendant's commission of twenty cents per head, for each sheep and lamb sold, to pay the balance of the price thereof to this plaintiff; that said defendant sold said sheep and lambs for the sum of $724.35, which he received; that said defendant's commission for making such sale, amounted to the sum of $35.40, leaving due this plaintiff the sum of $688.95;

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that this plaintiff demanded said last named sum of said defendant, but said defendant refused to pay the same or any part thereof, and has converted it to his own use," and demanded judgment against the defendant for $688.95, and interest thereon from April 3, 1885, besides costs.

The defendant's answer denied "the delivery by plaintiff of the sheep and lambs as alleged in the complaint, or that he was to sell the same for cash, or that he received the proceeds of the sales," and alleged "that about the year 1870, while in the commission business as alleged, he entered into an agreement with one 'Ricky' (Richard) Donovan, the father of plaintiff. . . by which said Richard Donovan was to consign sheep and lambs to defendant, to be sold on commission; that the manner and terms of sale by defendant, and his mode of settlement with said Richard Donovan, constituted no part of the conversation resulting in said agreement; that being determined by a usage or custom between commission merchants dealing in defendant's line of business and their consignors, of which said Richard Donovan was aware, and pursuant to which said agreement was made; that under and by virtue of said usage or custom, a commission merchant accounted to his consignee every Saturday, giving him his individual check for the amount of the sales, less his commissions, irrespective of his having realized the proceeds of such sales, such commission merchant dating such checks ahead for his own accommodation; that pursuant thereto, this defendant so accounted to said Richard Donovan during all his dealings with him, which continued from about 1870 to April 1885; that in January, 1879, said Richard Donovan requested defendant thereafter to make his checks payable to the order of Donovan & Co. which he did until January, 1883,

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when said Richard Donovan requested defendant thereafter to make them payable to the order of D. Donovan, who is the plaintiff herein. . . . which this defendant accordingly did; that in all other respects the dealings continued to be between said Richard Donovan and this defendant, as theretofore, the defendant not knowing who Donovan & Co. and D. Donovan were, and never having had any dealings with them except as aforesaid."

It also set up new matter not relevant to the questions considered in the opinion.

On an affidavit containing substantially the same averments as the complaint, except that the allegation that the plaintiff had converted the money claimed, to his own use, an order for the defendant's arrest was procured, which was duly executed. The defendant thereupon moved upon the pleadings and on an affidavit confirming his answer to vacate the order of arrest. On the motion the plaintiff submitted counter affidavits contradicting the allegations of the answer and confirming those in the complaint among which there was one by Richard Donovan setting out the making of the agreement sued upon as follows: "that he [Richard Donovan] is acquainted with the defendant and is the agent and manager for plaintiff; that on or about the day of 1883, at the defendant's place of business, he made the agreement with defendant in relation to the selling of sheep and lambs on commission for the plaintiff herein, and it was then agreed by and between the defendant and this deponent, as the agent of the plaintiff herein, that all sheep and lambs sold by said defendant should be paid for on each Saturday."

The motion was denied at special term of the city court of New York, and the order denying it, affirmed by the general term of said court.

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Horace Secor, Jr. (*John T. Cornell*, attorney), for defendant, appellant.

It has been repeatedly held by the court of appeals, that an agent or person acting in a fiduciary capacity is not subject to an action for tort, for not paying over money due; and in an action against him for not paying over a balance due, the plaintiff does not, by alleging that the defendant has converted the money to his own use, convert the action into one for tort; that allegation is mere surplusage, and the action is *ex contractu*. Therefore, the cause of action is not identical with the ground of arrest. Segelken *v.* Meyer, 5 *N. Y. Civ. Pro.* 1; Greentree *v.* Rosenstock, 61 *N. Y.* 583; Prouty *v.* Swift, 51 *Ib.* 594; Wood *v.* Henry, 40 *Ib.* 124. . . . . The allegation in the complaint as to the alleged fiduciary capacity in which defendant acted, is not traversable, and does not constitute any part of the cause of action. (See cases above cited.) Cited to support claim, that the parties were mere debtor and creditor, and the defendant, therefore, not liable to arrest. Wallace *v.* Castle, 14 *Hun*, 106; Duguid *v.* Edwards, 50 *Barb.* 300, 301; Morange *v.* Waldron, 6 *Hun*, 529; Robbins *v.* Falconer, 43 *N. Y. Super. Ct.* (11 *J. & S.*) 363; Alliance Ins. Co. *v.* Cleveland, 14 *How. Pr.* 408; Grover & Baker S. M. Co. *v.* Clinton, 5 *Bissell* (*U. S. Circ. Ct.*) 324; Woolsey *v.* Cade, 15 *Natl. Bkcy. Reg.* 238; Ownsley *v.* Cobin, 15 *Id.* 489. The order is, of course, appealable. *Code of Civil Procedure*, § 3191, subd. 3, as amended by *L.* of 1882, chap. 399.

Joseph C. Wolff, for plaintiff, respondent.

The defendant acted in a fiduciary capacity, and was liable to arrest. Holbrook *v.* Homer, 6 *How. Pr.* 86; Turner *v.* Thompson, 2 *Abb. Pr.* 444; Frost *v.* McCarger, 14 *How. Pr.* 131; Schudder *v.* Shiells, 17 *Id.* 420; Ostell *v.* Brough, 24 *Id.* 274; Barret *v.* Gracie, 34

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Barb. 20; Duguid *v.* Edwards, 50 *Id.* 288; German Bank *v.* Edwards, 53 *N. Y.* 541; Kelly *v.* Scripture, 9 *Hun*, 283; Trunninger *v.* Busch, 7 *Daly*, 124; Wallace *v.* Castle, 14 *Hun*, 106; King *v.* Arnold, 84 *N. Y.* 668, more fully reported in 12 *N. Y. Weekly Dig.* 30. The cause of action and the grounds of arrest are the same. In such cases the court will not vacate the order of arrest on motion. Republic of Mexico *v.* Arrangois, 5 *Duer*, 634: Geller *v.* Seixas, 4 *Abb. Pr.* 103; Barret *v.* Grace, 34 *Barb.* 20; Frost *v.* McCarger, 14 *How. Pr.* 131; Levins *v.* Noble, 15 *Abb. Pr.* 475; Lorillard Fire Ins. Co. *v.* Meshural, 7 *Robt.* 308; Swift *v.* Wylie, 5 *Id.* 680; Gibbs *v.* Hichborn, 12 *Hun*, 480; Merritt *v.* Heckscher, 50 *Barb.* 451. The granting or denying of the motion to vacate the order of arrest, rested in the discretion of the city court, and the order is not reviewable in the common pleas. Clarke *v.* Lowrie, 82 *N. Y.* 580, and cases there cited.

[1] J. F. DALY, J.—The complaint alleged a cause of action upon contract. The allegation of conversion of the proceeds of sale was mere surplusage. On the trial such allegation will be disregarded and plaintiff allowed to recover upon contract (Conaughty *v.* Nichols, 42 *N. Y.* 83). Even if the complaint alleged that the defendant received the proceeds in a fiduciary capacity, no proof of that allegation would be essential to plaintiff's recovery; a ground of arrest, based upon a claim that defendant acted in a fiduciary capacity, is extrinsic to the cause of action. It is not necessary to make such an allegation in the complaint, in order to sustain an order of arrest. Where such allegation is contained in the complaint, but no order of arrest has been granted, the defendant would not be subject to execution against the person (Segelken *v.* Meyer, 5 *N. Y. Civ. Pro.* 1).

[2] It follows from this authority that the cause of

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action here and the cause of arrest are not identical, and that the jury, upon the trial of this action, will not have to pass upon the questions which are involved in the arrest of defendant. It was the duty of the court to decide upon the pleadings and affidavits whether the relation between plaintiff and defendant was one of personal trust and confidence in the latter, or that of consignee and commission merchant as alleged in the answer (Fuentes *v.* Mayorga, 7 *Daly*, 103). And see on this subject Merrill *v.* Thomas, *Id.* 395; Clark *v.* Pinkney, 50 *Barb.* 226; Duguid *v.* Edwards, 50 *Id.* 288; Sutton *v.* DeCamp, 4 *Abb. Pr. N. S.* 483; Stoll *v.* King, 8 *How. Pr.* 298.

The city court did not examine the question presented by the affidavits in the light of this duty, but referred it to the jury on the trial. This is the express decision of the special term; and the general term, while it does state that "assuming that the order of arrest was granted on extrinsic facts, we are of opinion that the justice was correct in refusing to vacate," finally concludes that, for those reasons and "upon the ground stated in the opinion of the court at special term," the order must be affirmed.* This puts the

* The opinion of the special term of the city court (filed May 22, 1885), is as follows:

McAdam, C. J.—The complaint alleges that the plaintiff delivered to the defendant, as a commission merchant, one hundred and seventy-seven sheep and lambs, to be sold for cash, the proceeds, after deducting commissions, to be returned to the plaintiff; that the defendant sold said sheep and lambs for $724.38, which he received, and that after deducting his commissions, which amounted to $35.40 there remains due to the plaintiff $688.95, which the defendant refused to pay over on demand, and that he converted the same to his own use.

These facts allege a fiduciary relation, a term which implies the idea of a trust, confidence, that is, where a trust is reposed and confidence given. The facts charged in the plaintiffs' complaint and affidavit, therefore, established a case in which, according to the

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affirmance upon the ground that in the language of the special term opinion "The jury will be called upon to weigh and determine when the cause is tried" the question of right to arrest, "which

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authorities, the defendant is liable to the arrest (Duguid v. Edwards, 50 *Barb.* 288; Schudder v. Shields, 17 *How. Pr.* 420). If, on the other hand, the defendant sold upon a *del credere* commission, the defendant was authorized to mingle the money collected with his own, and became only a general debtor to the plaintiff for the amount due (Sutton v. De Camp, 4 *Abb. N. S.* 484).

If the custom pleaded by the defendant in his answer exists, and *was known to* and acquiesced in by the plaintiff, the defendant had the implied right to mingle the money collected with his own, had the right to use it in the conduct of his business as a factor and commission merchant, and became a general debtor only to the amount of the sales. This perhaps was the arrangement between the parties hereto, for the payments to the plaintiff were made by checks of the defendant drawn against the bank account of the defendant, in which his funds were indiscriminately mingled, checks were given for the amount of the sales, whether the defendant had realized from them or not. While this circumstance is not controlling (Duguid v. Edwards, 50 *Barb.* 292), it, with the general course of dealing between the parties, may have created between them the ordinary relation of debtor and creditor.

The test sometimes applied, is whether the specific moneys ought to have been kept and paid over, or whether the agent had the right, under the agreement of the parties, to use the money and mingle it with his own (See Grover & Baker S. M. Co. v. Clinton, 5 *Biss.* [*U. S. Circ. Ct.*] 324; Woolsey v. Cade, 15 *Nat. Bktcy. Reg.* 238; Ownsley v. Cobin, 15 *Id.* 489). In conversion this is essentially so (Morange v. Waldron, 6 *Hun*, 529; Greentree v. Rosenstock, 61 *N. Y.* 583; Wood v. Henry, 40 *Id.* 124; Walter v. Bennett, 16 *Id.* 250; Harris v. Schultz, 40 *Barb.* 318), for conversion will not lie except for specific moneys, and not where the defendant may redeem himself by returning an equal amount of money (Abbott, C. J., in Ottom v. Butler, 5 *Barn. & Ald.* [*Eng. K. B.*] 652). But I do not regard the present as an action for conversion, the use of that term in the present instance is mere surplusage. The action is to recover for money collected in a fiduciary capacity, and the question of preserving the identity of the money by deposit in trust or the like is important only as bearing on the question whether or not the plaintiff assented that it might be indiscriminately mixed with other funds of the

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cannot be intelligently decided in the present instance in advance of the trial." Under the decision in Segelken *v.* Meyer, above cited, this view appears to be

defendant's for use in his business, and in that way establish that the ordinary relations of debtor and creditor between the parties were created. In the one case, the agent receives the money on a special trust to pay it over to his principal. The principal confided in the man and the nature of the trust, rather than in the *pecuniary ability* of the agent to pay. In the other, the principal is supposed to have reposed confidence in the honesty and pecuniary ability of the agent to make good his account (Stroll *v.* King, 8 *How. Pr.* 298). The defendant undoubtedly became indebted to the plaintiff in the amount of the sales, but whether the mere deposit of the money collected with other moneys of the defendant, or the use of the proceeds of the sale in the defendant's business, can be called a misappropriation or conversion of the money, depends, as before remarked, upon whether the course of dealing between the parties countenanced and justified such application of the proceeds. The form of action, which is of some moment to the defendant, depends upon nice distinctions therefore to be drawn from the facts.

In order to apply the rule contended for by the defendant, it must affirmatively be made to appear that the plaintiff knew of and assented to the intermingling of the proceeds of sale by the defendant with money of his own, to be used in the defendant's business, so as to imply a credit to the defendant on his financial ability to pay, for as was said by the court in Duguid *v.* Edwards (50 *Barb.*, at p. 501): "The right to arrest the factor for not paying over the proceeds of property placed in his hands to be sold for his principal, is one of the safeguards the law has provided for the protection of the confiding. . . . . And the factor should not be allowed to evade or avoid it without satisfactorily showing that it was the clear understanding of the principal that he was to act for him in some different capacity, which necessarily conferred the right of making use of the principal's moneys if the convenience of his own business required him to do so."

The question, which is a close one, is therefore reduced to one of understanding and intent, evidenced by knowledge and circumstances which the jury will be called upon to weigh and determine when the cause is tried, and which cannot be intelligently decided in the present instance in advance of the trial.

Under these circumstances, I will not anticipate the finding of the

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erroneous, and the order should be reversed to the end that the motion to vacate the order of arrest may be heard upon its merits.

VAN HOESEN, J.—[Concurring.]—This action is not for the conversion of personal property, and an order of arrest could not be granted under section 549. [*] The action is for money had and received by a factor, and the only authority for an order of arrest is the third subdivision of section 550. The facts authorizing an arrest should not be set out in the complaint, nor is proof of them within the issues that the jury are to try. A jury could never, therefore, pass upon the question which Chief Justice MCADAM said, in his opinion, he would leave to them for decision. The question is not to be decided by a jury, but by a judge at the special term; and therefore, I concur with Judge J. F. DALY in reversing the order.

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jury, but will retain the order of arrest until the trial, upon condition that the plaintiff approves of the defendant's undertaking, and consents to a speedy trial, if the defendant desires one. No costs.

The following is the opinion of the general term of the N. Y. City Court on affirming the order of the special term entered on the foregoing opinion:

BY THE COURT.—We are of opinion that the cause of action and the cause of arrest are identical. The plaintiff charges in his complaint that the defendant received moneys of plaintiff in a fiduciary capacity, and has failed to account for them, but has converted the same to his own use; and in this view of the case the order of arrest should not be vacated at special term, except upon evidence so clear as to leave no possible doubt in the mind of the court, upon the questions presented. This is certainly not such a case; and even assuming that the order of arrest was granted on extrinsic facts, we are of opinion that the justice at special term was correct in refusing to vacate the order.

For these reasons, and upon the grounds stated in the opinion of the court at special term, the order must be affirmed, with costs.

HAWES, HALL and BROWNE, JJ., concurred.

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LARREMORE, P. J.—[Dissenting.]—The order is one affecting a substantial right, and is properly [*] appealable within subdivision 3, section 3191, of the Code of Civil Procedure. The facts alleged in the complaint establish an action for conversion, the plaintiff claiming the identical proceeds realized [*] from the property to be sold. That the prayer of the complaint demands a money judgment in no way changes the form of the action (Trunninger *v.* Busch, 7 *Daly*, 124; King *v.* Arnold, 84 *N. Y.* 668; Greentree *v.* Rosenstock, 61 *Id.* 583). It is true that the answering affidavits used upon the motion to vacate the order of arrest, show that the transaction between the parties was one *ex contractu;* but the facts alleged in the complaint (as before stated) characterize the transaction, and the plaintiff must stand or fall upon their proof, as alleged in his complaint. The order appealed from must be affirmed, with costs.

COON *v.* DIEFENDORF.

SUPREME COURT, FOURTH DEPARTMENT, MONROE COUNTY, SPECIAL TERM, JULY, 1885.

§ 3234.

*Costs.—When both parties entitled to, in action of ejectment.**

Where an action of ejectment was brought to recover two separate parcels of land, separately described in the complaint, which contained only one count, and the plaintiff recovered but one of such parcels, —*Held*, that both the plaintiff and the defendant were entitled

* See Cooper *v.* Jolly (3 *N. Y. Civ. Pro.* 9), in which it was held, that, where, in an action for the recovery of money only, the plaintiff had a verdict in his favor on some causes of action set out in the complaint, and the defendant on others, both were entitled to costs.

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to costs of the action; that the rule in such cases is the same as in an action to recover a chattel.

Seymour v. Billings (12 *Wend.* 285); Ackerman v. De Lude (36 *Hun*, 44), followed and applied; Martin v. Martin (3 *How. Pr.* 203), not followed.

(*Decided July*, 1885.)

Motion by defendant that the clerk be required to tax costs of the action in his favor, and set off the same against the costs recovered by the plaintiff.

The facts are fully stated in the opinion.

C. M. Allen, for the defendant and motion.

George D. Forsythe, for the plaintiff, opposed.

ANGLE, J.—The question is as to the construction of section 3234 of the Code of Civil Procedure, which provides that when "the complaint sets forth separately two or more causes of action, upon which issues of fact are joined, if the plaintiff recovers upon one or more of the issues, and the defendant recover upon the other or others, each party is entitled to costs against the adverse party, unless it is certified that the substantial cause of action was the same upon each issue; in which case the plaintiff only is entitled to costs." This provision, as far as the present question is concerned, is substantially the same as the provisions of the revised statutes* (Ackerman v. De Lude, 20 *N. Y.*

See also, Willard v. Strachan (3 *N. Y. Civ. Pro.* 452), holding that, when the complaint was dismissed as to one count, and the plaintiff had a verdict in his favor on another, the plaintiff only was entitled to costs.

* 2 *R. S.* 617, § 26, which read as follows:

"Section 26. When there shall be several issues joined in any cause, and a verdict shall be rendered for the plaintiff on one or more of them, and for the defendant on another, if the plaintiff obtains judgment upon the whole record, costs must be awarded as follows:

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Weekly Dig. 544),* and the provisions of the revised statutes were construed in Seymour *v.* Billings (12 *Wend.* 285), in which it was held that, as the law stood before the revised statutes, where the declaration in replevin contained only one account for a variety of articles, and a plea of property was interposed by the defendant, and the jury found the property of a portion of the articles to be in the plaintiff, and that the value thereof exceeded $50, and the property of the residue of the articles in the defendant, and that the value thereof was $90, each party was entitled to costs against the other. On page 287 the court say: "The jury under the form of pleading having found the title of a part of the property replevied by the plaintiff to have been in the defendant and the title of the residue in the plaintiff, effect must be given to the verdict in the same manner as though the declaration had contained two distinct counts for the respective parcels, or the defendant had averred for each respectively. Each party then, in this case, has a substantial issue found in his favor, and the general rule in the action of replevin seems to be that each party shall have costs of the issues on which he succeeds. Both are considered as plaintiffs or actors (Wright *v.* Williams, 2 *Wend.* 632). But under the revised statutes this is made the general rule applicable to all actions (2 *R. S.* 617, § 26)."

In Martin *v.* Martin (3 *How. Pr.* 203), the special

"1. When the substantial cause of action was the same in each issue, the plaintiff shall recover the costs on those issues which were found for him, and shall not be liable to the defendant for the costs of the issue which shall have found for such defendant:

"2. When there are two or more distinct causes of action, in separate counts, the plaintiff shall recover costs on those issues which are found for him; and the defendant on those which are found in his favor."

* S. C., 36 *Hun*, 44.

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term declined to consider Seymour *v.* Billings as authority beyond the action of replevin, and held it inapplicable to ejectment.

In Stoddard *v.* Clark (9 *Abb. N. S.* 314), the court of appeals says that the court held in Seymour *v.* Billings that, "the declaration, although it contained only one count for a variety of articles, being regarded, for the purpose of costs, as containing two distinct counts for the respective parcels of property."

In Ackerman *v.* De Lude (*supra*), the general term in this department, in construing section 3234 followed Seymour *v.* Billings, and went upon a principle of construction applicable with stronger reason to such a count in ejectment as in the case before me than to a count in replevin for different articles of personal property. The above quotation from Seymour *v.* Billings shows that the court was of opinion that the revised statutes had made the rule theretofore prevailing in replevin applicable in all actions. True, this part of the opinion is *obiter*—for the court had already decided in that case that the defendant was entitled to costs as the law stood before the revised statutes, and it was immaterial whether the statute had extended the same rule in other cases.

My conclusion is, that under section 3234 of the Code the same rule prevails in ejectment as in replevin, and I am therefore constrained not to follow Martin *v.* Martin.

The motion is granted, without costs.

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LORING, AS EXECUTOR, ETC., RESPONDENT, v. BINNEY. JACKSON, PURCHASER, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, NOVEMBER, 1885.

§§ 440, 442, 723.

Service by publication—Irregularities in notice required to be published with summons, that do not prevent court acquiring jurisdiction of defendant's person.

Where an order for the service of the summons in an action, on non-resident defendants was regularly and properly granted, and service of the summons was in all respects duly made thereunder, except that the notice required, by section 442 of the Code of Civil Procedure, to be published with the summons was not specially directed to the defendants so served, and incorrectly stated, that the summons was "served without the state," instead of stating, that it was served "by publication,"—*Held*, that the court acquired jurisdiction of the persons of the defendants so served by such service of the summons, notwithstanding the defect in the form of notice published; [1,2,3] that the failure literally to comply with the directions of the Code concerning the form of notice which was to be published, but not in fact served or required to be served upon either of the defendants, was a mere irregularity that did not deprive the court of the jurisdiction obtained by the service of the summons, [1] and which the court is bound to disregard.[4]
(*Decided November*, 1885.)

Appeal by James M. Jackson from an order denying a motion to relieve him from taking title to certain real estate purchased by him at a sale directed by the judgment in this action.

The opinion sufficiently states the facts.

William Man & Henry H. Man (*A. P. & W. Man*, attorneys), for purchaser, appellant.

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William Watson, for plaintiff-respondent.

George W. Van Slyck, guardian *ad litem* for infant defendants, respondent.

The only adjudications upon the questions involved sustain the validity of the judgment, and that the alleged defect was no objection to the title. Thistle *v.* Thistle, 5 *N. Y. Civ. Pro.* 43; McCully *v.* Heller, 66 *How. Pr.* 468. This "defeat" is not jurisdictional, because the defendants are infants. Section 438 of the Code of Civil Procedure, which provides for the service of a summons in an action upon a non-resident, is equally applicable to an infant as to an adult. Syracuse Savings Bank *v.* Burton, 6 *N. Y. Civ. Pro.* 216; Wheeler *v.* Scully, 50 *N. Y.* 667. If the service be good against an adult, it is equally good against an infant. This "defect" is not jurisdictional, because the Code requires the service of a notice, from which the defect shall be absent, in order to acquire jurisdiction. The Code makes no such requirement. Jurisdiction over a defendant is not acquired by, nor can it be divested by this printed notice. Jurisdiction alone is acquired by the service of a summons in one of the three modes prescribed by the Code, upon a defendant, and not by the service of any other process, notice or proceeding whatsoever, save in the case of provisional remedies. *Code of Civ. Pro.* §§ 398, 416, 426, 427, 438, 440, 445; McCarthy *v.* McCarthy, 13 *Hun*, 580; Ingersoll *v.* Mangam, 84 *N. Y.* 625. The printed notice mentioned in 442 is not a part and parcel of the summons. Section 442 says, that it is to be subjoined and published with the summons. It is not served upon the defendant by mail in pursuance of an order of publication, with a copy of the summons, complaint and order. *Code of Civ. Pro.* § 446; LaFarge *v.* Mitchell, 4 *N. Y. Monthly Law. Bull.* 36. The notice is only served with the summons, when the service is

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made upon the defendant, personally without the State. see Code of Civil Procedure, § 443. Nor is it (notice) required by section 442, to be filed with the summons, complaint and order, and it forms no part of the judgment-roll. Jurisdiction having been acquired by the due service of the summons, any defects in the notice may be remedied by amendment. *Code of Civ. Pro.* §§ 720-723; Gibbon *v.* Freel, 93 *N. Y.* 93.

The printed notice is in substantial compliance with the requirements of section 442. This section does not prescribe that the form of the notice therein set forth shall be used. It expressly says that a notice substantially as therein directed shall be attached, and if this word substantially means any thing in relation to this notice, it means that the notice shall contain the essential or material part of the notice set forth. . . .

"The only object of requiring the notice," say the court in Thayer *v.* Lewis (4 *Denio*, 271), "is to inform the defendant of a fact that he could not learn from the process itself. See Cox *v.* N. Y. Central R. R. Co., 61 *Barb.* 618. This notice affords the defendants no information which they are unable to learn from the order to which the notice particularly refers them. . . .

The contentions of the purchaser, that as this notice is statutory, it must be strictly followed, and that the court possesses no power to amend any defect therein, seems founded in error, for these reasons: 1st. Section 442 expressly states that the notice is to be only substantially as therein set forth. 2d. The provisions of the Code of Civil Procedure are not too strictly constructed. *Code of Civ. Pro.* §§ 519, 3345, Graves *v.* Waite, 59 *N. Y.* 162. 3d. The Code expressly gives the court the power to make such amendments. More comprehensive language, say the court in Viadera *v.* Viadera (7 *Hun*, 313), could hardly be used, than that found in sections 721, 723. There

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seems to be no restraint to such power, as it is said in Byrnes *v.* Dunn (6 *N. Y. Weekly Dig.* 140), excepting the discretion of the court. . . .

Section 723 also declares that the court may amend any process or proceeding, after judgment, by correcting any mistake, by conforming the proceeding, or by disregarding any error which does not affect the substantial rights of the adverse party. See *Bliss Code*, 2d ed. p. 608. 4th. The court uniformly exercise the power to cure defects in these processes and proceedings, though strictly statutory, as observed in the case of the summons, of the order of publication, and the notice in action to recover penalties under the revised statutes. Sections 417, 418 of the Code of Civil Procedure (*Code of Procedure*, § 129) prescribes the form and substance of the summons, and it is mandatory, yet the court constantly cured defects therein or violations thereof. See Wiggins *v.* Richmond, 58 *How. Pr.* 376; Jacquerson *v.* Van Erben, 2 *Abb. Pr.* 315; Close *v.* Gillespey, 3 *Johns.* 525; Van Wyck *v.* Hardy, 39 *How. Pr.* 392; Abbott *v.* Lowell, 98 *N. Y.* 665; Sluyter *v.* Smith, 2 *Bosw.* 673; Gibbon *v.* Freel, 93 *N. Y.* 93. So where the summons states that the complaint is annexed when such is not the fact. Keeler *v.* Belts, 3 *Code R.* 183. The summons framed under the wrong subdivision of section 129 of the Code of Procedure will be amended after judgment. Willett *v.* Stewart, 43 *Barb.* 100; Champlin *v.* Deitz, 37 *How. Pr.* 214; McDonald *v.* Walsh, 5 *Abb. Pr.* 68; Abbott *v.* N. Y. Central R. R. Co., 12 *Abb. Pr. N. S.* 465. A published summons omitting the name of the defendants, does not invalidate the judgment, in the absence of proof that the summons served contained all the names. Van Wyck *v.* Hardy, Ct. of Appeals, 39 *How. Pr.* 392. The fact that a summons served by publication states the day on which the complaint was filed, as a day later than it really was, is not an irregular-

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ity which affects the judgment. Jacquerson *v.* Van Erben, 2 *Abb. Pr.* 315. An order for publication directed that the summons in the action should be published, and the copy summons recited in the published order as annexed, was not the summons which was required to be published, but one requiring the defendant to appear and answer in six instead of twenty days, held, that this did not render order void, or effect judgment. Van Rhade *v.* Van Rhade, 2 *T. & C.* 491. When a published summons stated the time within which defendant was required to answer as six days instead of ten, as required by the Code of Civil Procedure, the court held that this defect was a mere irregularity, and that it might be amended, *nunc pro tunc.* Gibbon *v.* Freel, 93 *N. Y.* 93.

Section 440 of the Code of Civil Procedure prescribes the form and contents of the order for service by publication, yet the court cures defects therein or violations thereof by amendment. Mojarreita *v.* Saenz, 80 *N. Y.* 553; Phinney *v.* Broschell, 80 *Id.* 545; reported below 19 *Hun*, 115; Green *v.* Squires, 20 *Hun*, 15.

The Code, § 440, requires the order to be made by a judge—yet the court, in Mojarrèita *v.* Saenz, Phinney *v.* Broschell, and Coffin *v.* Lesster, held that an order which appears from its body to have been made by a judge is not void by reason of having a caption at special term and a direction to enter, and that there was no objection to the court's amending it by striking out such superfluous portions. In Coffin *v.* Lesster,* decided at March general term, supreme court, 1885, the court directed an order of publication made at special term to be amended so as to make it an order at chambers, and the general term sustained the

* 36 *Hun*, 347.

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amendment. It is provided that upon every process issued for the purpose of compelling the appearance of the defendant to any action for the recovery of any penalty or forfeiture, shall be indorsed a notice, showing the nature of the action, and reference to the statute and the form of the notice is prescribed. The courts, however, have gone so far as to hold that the notice was not necessary at all where the information is otherwise conveyed to the defendant. Cox *v.* N. Y. Cent. R. R. Co., 61 *Barb.* 618; People *v.* Bull, 42 *N. Y. Super.* (10 *J. & S.*) 20; Thayer *v.* Lewis, 4 *Denio*, 269; Abbott *v.* N. Y. Cent. R. R. Co., 1 *Super. Ct.* (*Sheldon*) 278. The court have never hesitated to cure by amendment defects in this notice attached to the printed summons, citing La Farge *v.* Mitchell, 4 *N. Y. Monthly Law Bul.* 36; Orvis *v.* Goldschmidt, 2 *N. Y. Civ. Pro.* 314.

DANIELS, J.—The sale was made under a judgment obtained for the construction of the will of the testatrix, and directing the sale of the premises known as 17 Madison avenue. The purchaser refused to receive and accept the title, because of a failure to comply with the requirements of the Code prescribing the proceedings to be taken for the service of the summons upon certain infant and adult defendants residing out of this State. The infants were each of them over the age of fourteen years, and were liable to be served with the summons as non-resident defendants by complying with the directions contained in the Code on this subject. Upon an affidavit reasonably sufficient for that purpose, an order of publication was made in the usual form directing the service of the summons to be made upon the defendants residing in other States by publication, and by mailing a copy of the summons and complaint to each of said defendants.

In compliance with this order, a copy of the sum-

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mons and complaint and of the order of publication was mailed to each non-resident defendant at his or her place of residence, as that was directed by the order, and the summons itself, with a notice attached thereto, was published in the newspapers designated in the order. But instead of the notice which was published with the summons stating that the summons was served by publication, pursuant to an order of the judge who made it, as that was required by section 442 of the Code, the notice directed by section 443 was published, stating that the summons was served without the State of New York, pursuant to an order of the judge. The notice which was published also failed to be directed to the defendants alone who were to be served with the summons by publication. And the point now to be determined is whether the failure to comply with the requirements of the Code in these respects so far invalidated the service as to deprive the court of jurisdiction over these absent defendants.

Applications were made on behalf of the infants for the appointment of a guardian *ad litem*, and such a guardian was appointed for them, who appeared in their behalf in the action. But it is not important that any particular stress should be placed upon this fact, for the reason that the adult defendants residing out of the State, and also served in this manner, did not appear in the action.

The disposition of the case must therefore depend upon the question whether jurisdiction was acquired over these defendants residing in other States by the proceedings as they appear to have been taken.

As the summons was served by publication, and not by the delivery of a copy of it to the respective defendants out of the State, they each received by the papers which were mailed to them all that was required should be sent to them.

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The practice to this extent is controlled and regulated by section 440 of the Code, which by its effect directs that the copies of the summons, complaint and order should be mailed to the defendants to be served at the place or places where they would probably receive matter transmitted through the post-office. This section was fully complied with, and as the places to which the copy summons, complaint and order were mailed appear to be the places of residence of the respective defendants to whom they were sent by mail, it is to be presumed that they received these copies, and in that manner acquired all the information concerning the action and the authority to serve the summons by publication which the law provided they should have.

They were in this manner informed of the object and design of the action, and summoned to appear and present their defense, by way of answer, or that in default thereof judgment would be taken against them for the relief demanded in the complaint, and the authority for making this service was disclosed by the copy of the order accompanying the other papers.

The same result was also attained by the publication which was in fact made by the summons itself, and neither of the defendants, if reliance was placed upon the form of the publication, could have been misled to his or her prejudice by the statement in the notice that the summons was served without the State of New York, instead of its being stated that it was served by publication. For the residue of the notice was required to be and was identical in both classes of cases, and that contained the information that the summons was served pursuant to an order of a judge of the court, as that notice was required to be given by each of these sections of the Code. Whether, therefore, the notice stated that the summons was served without the State of New York or by publica-

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tion, was not important for the purpose designed to be accomplished by the notice required in the one case to be published or in the other to be served upon the defendants. For by either form of notice the essential information would be given that service of the summons was made under the authority of an order of a judge of this court, and the information was further given when that order was made, and where it could be found. The substantial objects intended to be accomplished by the notice were accordingly secured, even if the defendants relied upon the publication itself, for it clearly appeared from it that the publication was made under and by virtue of the authority vested in the judges of the court over this subject. And as that information was clearly supplied, it could not be important, as a matter of jurisdiction, whether the notice stated that the summons was served by publication or without the State of New York, pursuant to the order of the judge. The summons itself was the important document. When that was served in the manner directed by the Code, whether it was by [1] publication or by service personally upon the defendant without the State, the court acquired jurisdiction over the person of the defendant served. This has been provided for by section 416 of the Code, declaring that a civil action is commenced by the service of the summons, and as the suit was commenced by that service, the failure literally to comply with the directions concerning the form of the notice which was to be published, but not in fact served, or required to be served, upon either of the defendants, was no more than an irregularity which would not deprive the court of the jurisdiction obtained by the service of the summons in compliance with the directions of the order for its publication.

This mode of service included not only the formal publication of the summons, but also the mailing of a

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copy of the summons and complaint, and of the order of publication, to each one of these defendants. When that was done, and the period of publication had elapsed, the summons was completely served in
[*] the action, and the court could afterwards rightfully proceed to adjudicate upon the rights of the parties, notwithstanding this defect in the form of the notice which was published.

[*] The omission of the names of the defendant to be served by publication in the notice was a defect still more formal, and could by no possibility have misled either of the defendants, for the order of publication itself contained these names, and fully supplied all the information which the addition of the names to the notice would have secured.

Upon this general subject the Code has further provided, by section 723, that "In every stage of the action the court must disregard an error or defect in the pleadings or other proceedings which does not affect the substantial rights of the adverse party."

[*] There were clearly errors or defects of this description, for the omission of the names of the defendants who were to be served by publication from the notice, and the statement in it that the defendants were served with the summons without the State of New York, in place of the statement that they were served by publication, could by no possibility affect any substantial rights of either of these defendants. For, aside from these defects in the notice, they were supplied with complete information, either by the summons and notices as they were published, or by the copies of the papers which were mailed to them, or by both, that an action was being commenced in which judgment would be obtained against them by default if they failed to appear and answer, and that the proceedings for commencing it in this manner were authorized and sanctioned by an order of a judge of

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the court, as that had been provided for by the law of the State. And that was all that it was substantially important for their protection, that either of the defendants should know concerning the proceedings that were carried on. They had provided them with the opportunity of appearing and litigating the case, and informed them of the consequences of their failure to do that, and of the time within which their appearance for the purpose of contesting the action was required to be made.

Cases involving similar points of practice have already been presented to the courts, where at least as liberal a construction of the act as that which has been indicated, has been sanctioned (McCully *v.* Heller, 66 *How. Pr.* 468; Thistle *v.* Thistle, 5 *N. Y. Civ. Pro.* 43; Orvis *v.* Goldschmidt, 2 *Id.* 314; McCoun *v.* N. Y. Cent. &c., 50 *N. Y.* 176, 178, 179; Gibbon *v.* Freel, 93 *Id.* 93). Both by the construction plainly required to be given to these sections of the Code, and by force of these authorities, the proceedings taken in this action to acquire jurisdiction over the absent defendants are required to be sustained.

The purchaser therefore will obtain a valid title to the property sold to him under the proceedings in the action, and he should be required, as he was by the order from which the appeal has been taken, to complete his purchase. But while that order should be affirmed, it should be without costs, for the reason that greater care should have been observed in the proceedings to comply literally with what the Code has prescribed as the manner in which they should be taken.

DAVIS, P. J., and BRADY, J., concurred.

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ESTATE OF WOLF FERNBACHER, DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY, NOVEMBER, 1885.

§§ 2685 *et seq.*

Will—Power of surrogate to construe—When gives life estate only—Removal of executors for misconduct—Instance.*

The surrogate has power to construe a will where it is necessary to do so in order to determine an application for the removal of executors. [1]

Where a testator by his will gave all his real and personal estate to his wife "for her life, she to have the same power and control over said property as I [he] could have in my [his] own proper person during her said life estate," bequeathed to his "children or their heirs, all the rest, residue and remainder of my [his] real or personal property in fee absolute and forever which shall remain after the life estate" given to his wife, authorized her to pay in her discretion to his children "at any time during her life, all or any part of the share or shares to which all or any one" of his children was entitled, and appointed his wife and two other persons executors thereof, "with full power to sell at public or private sale at such times and upon such terms and in such manner as to them shall seem meet, in order that the terms" of the will "may be carried out,"—*Held*, that the testator's widow took a life estate, [2,] and could not by the exercise of any power derived from the will, acquire any personal interest in the property left by him at his death or in the proceeds of its sale other than such as pertains to a life estate; [3] that the case was not within 2 *R. S.* 732, §§ 81, 85, providing that "where an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power shall not be executed or the lands should not be sold for the satisfaction of debts;"

* See on this subject, Estate of Hood, court of appeals, March, 1885, 7 *N. Y. Civ. Pro.* 257.

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[18] that the power of sale given to the widow, and that given subsequently to the executors were intended to be exercised, not for the widow's benefit exclusively, but for the benefit of the remaindermen as well, who would be entitled upon her death to receive, without impairment or diminution, the principal estate; and that, in this sense, the power conferred may justly be regarded as one of trust. [20]

Wright v. Miller (8 *N. Y.* 9, 24); [3] Burleigh v. Clough (52 *N. H.* 267); [4] Bell v. Warn (4 *Hun*, 406); [5] Terry v. Wiggins (47 *N. Y.* 512); [6] Taggart v. Murray (53 *Id.* 233); [7] Smith v. Van Ostrand (64 *Id.* 278); [8] Thomas v. Pardee (12 *Hun*, 151); [9] Flanagan v. Flanagan (8 *Abb. N. C.* 413); [10] distinguished.

Bradley v. Westcott (13 *Vesey* [*Eng. Chy.*] 445); [12] Smith v. Bell (6 *Peters* [*U. S.*] 68); [13] Brant v. Virginia Coal Co. (3 *Otto* [93 *U. S.*] 320); [14] Boyd v. Strahan (36 *Ill.* 355); [15] Cory v. Cory (37 *N. J. Eq.* 198); [16] Stuart v. Walker (72 *Me.* 145); [17] followed.

In such a case it is clearly the duty of the executors to collect as soon as practicable the personal property left by the decedent, including the proceeds of any of the realty sold by them or coming to their hands, [21] and where they failed to do so, and omitted from an account filed by them, assets with which they should have charged themselves, and falsely represented the sum for which some of the property had been sold, and surrendered the entire assets of the estate to the widow,—*Held*, that they were guilty of such misconduct and improvident management of the estate as would justify their removal from office. [22]

While, under ordinary circumstances, executors should not turn over to one having simply a life estate therein, property given in remainder to another, without obtaining from the first taker security for the protection of the remainderman, [23] where there are clauses in the will creating such estates, which indicate that it was the testator's design to entrust to the life beneficiary the full possession and control of the estate, the executors are warranted, unless special circumstances making such a course hazardous exist, in surrendering it to the care of the life tenant, without requiring security. [24, 25]

Where executors surrendered an estate to a life beneficiary without requiring security, knowing that she purposed wasting it and destroying the interests of the remaindermen therein by converting and appropriating it to her individual use and benefit,—*Held*, that they were grossly remiss in the performance of their duty, and guilty of misconduct and improvident management that required their removal. [26]

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Estate of Fernbacher.

While it is the general practice to defer the determination of an application for the removal of executors, made pending accounting proceedings, until the termination of the proceedings, where no injustice will be done by the immediate removal of the executors, that will, in a proper case, be done.[']

(*Decided November*, 1885.)

Application by remaindermen for the removal of executors for misconduct and improvident management of the estate

The facts appear in the opinion.

Jacob Marks, for the motion.

Lauterbach & Spingarn, for the executors, opposed.

ROLLINS, S.—The issues raised by the objections interposed to the accounts of Nathan Fernbacher, executor, and Regina Fernbacher, executrix of this estate, are now on trial before a referee appointed by the surrogate. Pending such trial, the party at whose instance the accounting was ordered seeks the vacation of the testamentary letters heretofore issued to the accounting parties and to Samuel Abraham, their co-executor. The ground of this application is the alleged waste and misappropriation by the executors of the property and assets of the estate, and the improvident management of its affairs. The action of her associates in turning over, and suffering to be turned over to the executrix individually, and for her own use and enjoyment, the entire estate (after payment of certain legacies bequeathed by the third and fourth clauses of the will, and after certain disbursements specified in the account), and the action of the executrix herself in converting such property to her own use, are the main grounds upon which the petitioner relies in this proceeding.

['] In determining whether those grounds will

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support the revocation of letters, it is necessary to construe certain provisions in the testator's will. Of the authority of the surrogate in this regard, under such circumstances as the present, I have no doubt. The reasons that justify the exercise of such jurisdiction in proceedings for the judicial settlement of executors' accounts are equally applicable here. Those reasons are set forth in Tappen *v.* M. E. Church (3 *Dem.* 187).*

The testator's will contains the following provisions:

"1st. I give and bequeath to my wife Regina Fernbacher all my real and personal estate of whatsoever nature and wheresoever situate, for her life, she to have the same power of sale and control over said property as I could have in my own proper person, during her said life estate.

"2d. I give and bequeath to my children or their heirs, share and share alike, all the rest, residue and remainder of my real or personal property in fee absolutely and forever, which shall remain after the life estate given in the first provision of this, my will, to my wife Regina Fernbacher.

"3d. It is my will and I give and bequeath to my daughter Pauline Fernbacher $1,000, of the insurance which is now on my life in addition to that portion of my real and personal property which she shall be entitled to receive under the second provision of this my will.

"5th. It is my will, and I direct that my sons carry on the business in which I am now engaged without change so long as my wife, Regina Fernbacher, thinks best.

* See also to same effect, Estate of Orser, 4 *N. Y. Civ. Pro.* 129; Estate of York, 6 *Id.* 245, and cases their cited. *Contra*, *In re* Brown, 3 *Id.* 89.

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"6th. It is my will that my said wife, Regina Fernbacher, shall have power, and she is hereby authorized, in her discretion to pay to all or any one of my children, at any time during her life, all or any part of the share or shares to which all or any one of my said children may be entitled in my real or personal estate under the second provision of this my last will and testament.

"7th. I appoint my wife, Regina Fernbacher, executrix, and Nathan Fernbacher and Samuel Abraham executors of this my last will and testament, with full power to sell, at public or private sale, at such times and upon such terms and in such manner as to them shall seem meet, in order that the terms of this, my last will, may be carried out, any and all of the real estate or personal property of which I shall die seized and possessed."

Although the testator left him surviving several children, it is claimed by counsel for the respondents, that after payment of debts and expenses of administration, the testator's widow, by virtue of the first clause above quoted from the will, acquired the absolute title to all the property left by her husband and to the proceeds of such portion thereof as had been or might thereafter be sold, either under the power given by clause first or under that given by clause sixth; and the respondents' counsel insists that if this contention is erroneous, and if the interest of the widow is to be considered as limited to a life estate, she nevertheless has at all times been authorized to exercise for her own benefit absolute "power and control" over the property of the estate, and, by consuming the same if she saw fit so to do, to defeat the possibility of remainder to the children.

Neither of these propositions commands my approval.

The grant in clause first of "the same power of

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sale and control over said property" as the testator himself possessed, does not, when taken in connection with its immediate context, and with after provisions of the will, enlarge to a title absolute the interest which is expressly given Mrs. Fernbacher for life, nor does it authorize either complete or partial absorption by her of the principal of the estate.

In support of the claim of the absolute character of the widow's interest and of the invalidity of the dispositions in behalf of the children, several cases have been cited by counsel. In these cases the well known principle has been recognized, that where a testator has made an unqualified bequest or devise, and has thus evinced his intention that the beneficiary should have absolute property in the thing given, a subsequent limitation over is void because repugnant to the original disposition. Such is the doctrine of Helmer *v.* Shoemaker, 22 *Wend.* 137; Jackson *v.* Robins, 16 *Johns.* 538; Annin *v.* Vandoren, 14 *N. J. Eq.* 135; Downey *v.* Borden, 36 *N. J. Law*, 460; Stuart *v.* Walker, 72 *Me.* 145; Ide *v.* Ide, 5 *Mass.* 500; Paterson *v.* Ellis, 11 *Wend.* 259; Norris *v.* Beyea, 13 *N. Y.* 273, 286; Dutch Church *v.* Smock, *Saxton Ch.* (*N. J.*) 148; Jones *v.* Bacon, 68 *Me.* 34; Campbell *v.* Beaumont, 91 *N. Y.* 464.

[*] But I think it too plain for argument that, whatever may be the true construction of this will, the testator's widow has not acquired by the clause now under discussion such an absolute property in this estate as to invalidate the gift over. It is another question, however, whether she is limited to a bare life estate, with the right to demand and enjoy nothing more than the interest and income of a principal that is to go to others at her death, or whether her life estate is coupled with a power on her part to receive such principal in her lifetime and appropriate it wholly or in part to her own use, so that only such portion of

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it as may not at her death have been disposed of will pass to the children under the second clause of the will.

[*] Wright *v.* Miller (8 *N. Y.* 9, 24), decided in 1853, was a case in which A. had conveyed to a trustee certain real estate with a power during A.'s life, and with A.'s consent, to lease or sell the same, and, after making certain disbursements from the proceeds, to pay over the balance "for the reasonable support and maintenance of the grantor as she may require the same, and as to the residue thereof, if any there shall be, then upon trust," &c., &c. The court of appeals held that the limitation over for the benefit of A.'s children was valid, the power of disposition retained by A. being limited to so much of the proceeds of the property as might be needed to defray the expenses of her reasonable support and maintenance during her life.

[*] In 1872 the supreme court of New Hampshire in Burleigh *v.* Clough (52 *N. H.* 267) held, that where a testator gave his wife all his estate "to her use and disposal during her natural life," with a gift over of "what is remaining at her decease," the widow took an estate for life, together with a power practically to defeat the estate of the remainderman, but that the gift in remainder was nevertheless valid as to anything that she might leave at her decease.

[*] In 1875 our supreme court of the fourth department decided Bell *v.* Warn (4 *Hun*, 406). A testator had bequeathed $1,250 to his daughter, providing that the same should be invested, and that the interest thereon should be paid to her during her life semi-annually, and that, if from sickness or want, there was need to resort to the principal for her support, the executors should do so, even to the exhaustion of the entire fund. The will further provided for a gift over, of any portion of the $1,250 that might remain at

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the daughter's death. It was held that this gift over was good, though the life interest of the first taker was coupled with a power of disposing of the whole estate if such disposition should be needed for her maintenance.

[*] In Terry *v.* Wiggins (1872, 47 *N. Y.* 512), a testator gave the residue of his real and personal estate to his wife "for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same, if she should require it or deem it expedient so to do." He authorized his executors to invest whatever residue there might be at her decease, &c. By a previous clause in his will the testator had devised to his widow certain real estate "for her sole and absolute use and disposal." The court held that the terms first above quoted were to be discriminated from those quoted later, and that the widow took only a life interest in the residue; the power of disposal not operating to enlarge her estate to absolute ownership, and simply enabling her to encroach upon the *corpus* of the estate for whatever might be necessary for her personal use and maintenance.

[*] The language of a will construed in 1873 by our court of appeals, in Taggart *v.* Murray (53 *N. Y.* 233), was as follows: "All my remaining property I give to my daughter, Cornelia, for her support and comfort, to be held and controlled by her, and at her death to pass to her heirs, or if she leaves no heirs, to be disposed of by her will to whom and for what purpose she deems right and proper,"—*Held*, that the testator intended a gift of life estate only, the power of disposition by will being superadded, limited, however, upon the event of the life tenant's leaving no heirs.

[*] In 1876 the court of appeals in Smith *v.* Van Ostrand (64 *N. Y.* 278) held that a testator's

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bequest to his wife of a certain sum of money "for her support during her natural life," and his direction that, upon her death, the "said dower" should be transferred to his three children, when taken in connection with the following provision—"$50 of the above named sum shall be paid her as soon as possible after my decease, and the remainder on or about six months after"—must be construed as a gift of so much of the principal fund as might be necessary for his widow's support, and so much only; and that the gift of the remainder, subject to the exercise of the power, was valid and effectual.

[*] Thomas *v.* Pardee (12 *Hun*, 151) was decided in 1877. There a testator gave his wife all his estate, "to be possessed and used by her at her discretion and for her support and comfort during her natural life, having confidence in her that it will be used and retained, and the amount or increase and the residue left sacred to the purposes," &c. This was followed by a gift over of what might be left by the widow at her decease. She was declared entitled to draw principal and interest so far as the same might be necessary for her support, but the gift over was sustained.

[**] Flanagan *v.* Flanagan (8 *Abb. N. C.* 413) was determined in 1880. By the will there construed, a testator had given one-third of the residue of his estate to his wife, "to be hers absolutely." He had also given her "the use of all the remainder during her life, and the portion left of such remainder to A. B., &c." It was held that the words "left of such remainder" implied a right superadded to the rights of a life tenant to make disposition of the principal, even to its complete exhaustion and the consequent defeat of the limitation over; but it was nevertheless held that such limitation was a valid disposition.

From the cases above cited the case at bar can be

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clearly distinguished. I find in the language of the will before me nothing that warrants the interpretation that the widow of this testator is entitled to any portion whatever of the principal estate wherein she is given a life interest. By the first clause of the
["] will, on the contrary, whether it is considered by itself or in the light of the remaining clauses, it seems to me that a life interest pure and simple is intended to be conveyed.

["] In the well known case of Bradly *v.* Westcott (13 *Vesey* [*Eng. Chg.*] 445), Sir WILLIAM GRANT, as Master of the Rolls, construed a will whereby a testator gave certain property to his wife "for and during the term of her natural life, to be at her full, free and absolute disposal and disposition during her natural life." The widow was also given a power of appointment. In default of its exercise there was a gift over to certain designated persons. The court said: "As the testator has given to her" (his wife) "in express terms an interest for life, I cannot, under the ambiguous words afterward thrown in, extend that interest to the absolute property. I must construe the subsequent words, with reference to the express interest for life previously given, that she is to have as full, free and absolute disposition as a tenant for life can have."

["] In Smith *v.* Bell (6 *Peters* [*U. S.*] 68), where a testator had given his personal estate to his wife "to and for her own use and benefit and disposal absolutely, the remainder of said estate after her decease to be for the use" of the testator's son, it was held that the wife took a life estate only. MARSHALL, Ch. J., pronouncing the opinion of the court, said: "If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same as if the last member

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of the sentence were stricken out; yet both clauses are equally the words of the testator, are equally binding, and equally claim the attention of those who may construe the will. We are no more at liberty to disregard the last member of the sentence than the first. The first part of the clause, which gives the personal estate to the wife, would undoubtedly, if standing alone, give it to her absolutely. . . . The difficulty is produced by the subsequent words. They are: 'Which personal assets I give and bequeath unto my said wife, to and for her own use and benefit and disposal absolutely.' The operation of these words, when standing alone, cannot be questioned. But suppose the testator had added the words 'during her life.' These words would have restrained those which preceded them; and have limited the use and benefit, and the absolute disposal given by the prior words, to the use and benefit, and to a disposal for the life of the wife. . . . Even the words 'disposal absolutely' may have their absolute character qualified by restraining words, connected with, and explaining them to mean, such absolute disposal as a tenant for life may make."

["] Brant *v.* Virginia Coal Co. (3 *Otto* [93 *U. S.*] 320) was a case in which a testator had bequeathed to his wife all his real and personal estate "to have and to hold during her life and to do with as she sees proper before her death." FIELD, J., pronouncing the opinion of the court, said: "The interest conveyed was only a life estate. The language used admits of no other conclusion, and the accompanying words, 'to do with as she sees proper before her death,' only conferred power to deal with the property in such manner as she might choose consistently with that estate." The learned justice added that "where a power of disposition accompanies a bequest or devise of the life estate, the power is limited to such disposition as a tenant for

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life can make, unless there are other words clearly indicating that a larger power was intended."

["] In Boyd *v.* Strahan (36 *Ill.* 355) a testator's bequest to his wife of all his personal property "to be at her own disposal and for her own proper use and benefit during her natural life," was held to give her a life estate simply.

["] The following testamentary provision was under consideration in Cory *v.* Cory (37 *N. J. Eq.* 198): "I give all my estate to my wife for her sole use and benefit for and during her natural life, to be under her control and used by her as she sees fit to use the same, and in case she should find it necessary or see fit to dispose of any part or all of the same, I empower her, &c. . . . After the death of my wife, I order my executors to sell all my estate remaining at her decease and to dispose of the proceeds as follows," &c. *Held*, that the widow was entitled to a life estate only.

["] A similar construction was in Stuart *v.* Walker (72 *Me.* 145) put upon the words following: "All my estate, real and personal, with the right to use, occupy, lease, exchange, sell or otherwise dispose of the same according to her own will and pleasure during her life-time, and so much of the said estate as may remain unexpended and undisposed-of by my wife at my decease, I give," &c.

It is claimed by counsel for the executors that by sections 81 and 85, title 2, chapter 1, part 2, Revised Statutes (3 Banks' 7th ed. 2189), * this testator's widow

* 2 *R. S.* 732, §§ 81, 85, which are as follows:

"§ 81. Where an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon, in case the power shall not be executed or the lands should not be sold for the satisfaction of debts."

"§ 85. Every power of disposition shall be deemed absolute, by

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obtained under the will an absolute fee or interest, subject only to the taking effect of the remainder given to the children, in the event that the power of sale should not be exercised in the widow's life-time.

["] But these sections by their very terms are only operative where there is an "absolute power of disposition not accompanied by any trust," and in my judgment have no application to the case at bar.

["] Upon the authorities above cited, I hold that it has never been possible for Mrs. Fernbacher, by the exercise of any power derived from the will of her husband, to acquire any personal interest in the property left by him at his death or in the proceeds of its sale, than such as pertains to a life estate.

The conclusion thus warranted by decided cases as to the meaning of the first clause of this disputed paper is discovered upon examination to be in harmony with the clauses that follow. The second clause bequeaths to the children "in fee absolutely and forever the residue and remainder of the testator's real or" (*i. e.*, and) "personal property which shall remain after the life estate given in clause first. Here is a disposition of the remainder after a precedent life estate; that is, of what is left after the life estate has been carved out of the fee. There is in these words no suggestion that the life beneficiary, by wielding the power of disposition, can appropriate the entire estate to her own benefit and that the children are to enjoy only such part of the property as the widow may chance to leave at her death. Nor are the provisions in the third, fifth and sixth clauses in harmony with such interpretation. Those provisions, in connection with clause second, show that the testator intended to give his wife a simple life interest, with power of con-

means of which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit."

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verting the character of the property of the estate, and at her death to give his children the principal of such estate, whether it should then wear its original shape or should theretofore have assumed another.

It is unnecessary to cite authorities in support of that established canon of interpretation, that, in construing a will, the testator's intention must be sought from the instrument as a whole, and that its several provisions must be accorded such enlarging, restricting or qualifying effect, as seems most consistent with the purposes of its maker.

[*] When this will is thus construed, there is scarcely room for doubt that the power of sale given to the widow, and that given subsequently to the executors were intended to be exercised, not for the widow's benefit exclusively, but for the benefit of the remaindermen as well, who will be entitled, at their mother's death, to receive without impairment or diminution the principal estate of which she will have had the life enjoyment. In this sense, the power conferred may justly be regarded at one of trust, with which sections 81 and 85, above cited, are in no wise concerned (Coleman *v.* Beach, 97 *N. Y.* 545, 558; Thomas *v.* Pardee; Smith *v.* Van Ostrand; Flanagan *v.* Flanagan, *supra*).

[*] Now, in view of the relation which the widow and children of this decedent sustained towards the estate, it was clearly the duty of the executors to collect, as soon as practicable, the personal property left by decedent, including, of course, the proceeds of any of the realty sold by them or coming to their hands. This duty they owed to the remaindermen, who were entitled to be informed of the true nature, condition and value of the assets, and to have such of them as were outstanding realized and recovered; and this entirely irrespective of the question whether the executors were or were not authorized to turn over all the prop-

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erty of the estate to the life beneficiary without security for its preservation for those entitled in remainder.

Now it appears that in 1877 an account was filed with the surrogate by Nathan Fernbacher, Regina Fernbacher and Samuel Abraham, as executors. Another was filed by Nathan Fernbacher and Regina Fernbacher in the pending accounting proceeding before its issues were submitted to the referee. In the place of the latter a third has been since submitted.

The latest account shows that in that of 1877 the executors failed to include certain assets of whose existence they must then have been advised. The statement in schedule G of the last account, of the transfer by the accounting parties to the widow of such part of the assets contained in schedule A as had not been applied to the payment of debts and expenses of administration, shows that such assets were so transferred with the knowledge that the widow was about to convert them to her own use, and with the object of affording her opportunity of so doing. In the account of 1877 the business of the decedent was alleged to have been sold by the widow to her sons Nathan, Isaac and Philip for $6,000. In the account recently submitted to the referee, that business is declared to have been sold for the sum of $10,000, payable on demand. It is further alleged that "no demand of payment has ever been made, as the widow was directed by the testator prior to his death to give the business to his sons should she see fit and as she was authorized to do under his will."

[*] No direction of the testator such as is thus described would have been effectual to confer the authority claimed, nor is any such authority conferred by the will. The conduct of the executors in omitting from the first account assets with which they should then have charged themselves, and which, as

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I think, they intentionally omitted, the subsequent conduct of these accounting parties in falsely representing the sum for which the testator's business was disposed of, in neglecting to realize or to make any effort for realizing the amount for which the account last filed declares the business to have been actually sold, and in surrendering the entire assets of the estate to the widow, furnish sufficient proof of the improvident management of the estate, and of misconduct on the part of the executors to justify their removal from office.

It is urged by counsel for the respondents that, even if his contention respecting the extent of Mrs. Fernbacher's interest in the estate is erroneous, her co-executors were not at fault in surrendering the estate into her hands without requiring security for the remaindermen.

The law upon this general subject does not seem to be well settled.

In Westcott *v.* Cady (5 *Johns.* 334), the chancellor said: "Formerly the legatee, entitled to remainder after the estate for life, was allowed to call upon the legatee for life, not only for an inventory, but for security that the goods should be forthcoming at his decease. But the rule of practice has since been altered on that point." Some years later, in Covenhoven *v.* Shuler (2 *Paige*, 122, 132), the chancellor said: "The modern practice in such cases" (that is, in cases of bequest for life with limitation over of specific articles), "is to require an inventory of the articles, and security is not required unless there is danger that the articles may be wasted or otherwise lost to the remaindermen."

[**] It would seem from later decisions of the courts of this State that, under ordinary circumstances, executors should not turn over property to one who has simply a life estate therein, when such

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property is given in remainder to another, without obtaining from the first taker security for the protection of the remainderman (Tyson *v.* Blake, 22 *N. Y.* 558; Montfort *v.* Montfort, 24 *Hun*, 120; Livingston *v.* Murray, 68 *N. Y.* 485).

[24] Some of the clauses of this will, however, indicate that it was the testator's design to entrust to the life beneficiary the full possession and control of this estate. Where there is an expression in a will of such an intention, its executors are warranted, unless there are special circumstances making such a course hazardous, in surrendering the principal of the estate to the care of the life tenant without requiring security (Fiske *v.* Cobb, 6 *Gray* [*Mass.*] 144; Weeks *v.* Weeks, 5 *N. H.* 326; Taggard *v.* Piper, 118 *Mass.* 315; Flanagan *v.* Flanagan, *supra*; Smith *v.* Van Ostrand, *supra*).

The ground upon which the severity of the old practice has been somewhat abated is doubtless this: that for the court to decree security in all cases would often defeat the purposes of the testator. But whenever it has appeared that property bequeathed for

[25] life with remainder over has been in danger of being wasted, secreted or removed, the courts have held that the interests in remainder were entitled to be protected by compelling the life tenant to give security (2 *Perry on Trusts*, 3 ed. § 541).

The same regard to a testator's intentions which led the chancery court to abandon the practice of requiring security as of course upon the mere application of a remainderman whose interests were in no practical danger, demand the exaction of security where the testator's intentions are otherwise likely to be frustrated by the conduct of the tenant for life.

Now in this case there is the exceptional feature of the purpose on the part of the life beneficiary (a purpose well known to the other executors, and practi-

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cally countenanced by them) of wasting the fund and of destroying the interests of the remaindermen therein, by converting and appropriating it to her individual use and benefit.

[*] Under these circumstances, it seems to me that the executors were grossly remiss in failing to obtain security for the secure transmission to the remaindermen of the principal of this estate.

This failure I regard as evidence of misconduct and improvident management by the executors, and of unfitness for the due administration of their trusts.

[*] It is the general practice to defer the determination of an application of this character, pending accounting proceedings, until such proceedings have terminated, but the undisputed facts and the disclosures of the papers submitted herein, satisfy me that no injustice will be done to these executors by directing their immediate removal.

Let a decree be entered accordingly.

SAYLES, Respondent, *v.* MURPHY, Appellant.

St. Lawrence County Court, September Term, 1885.

§§ 3323, 3324.

Constable's travel fee.—Constructive mileage.

A constable can charge travel fee for no more miles then are actually and necessarily traveled in executing a mandate; and in case the distance actually and necessarily traveled, exceeds the distance from the place of abode of the person served, or the place where the mandate is served, to the place where it is returnable, and back, he can only charge for the distance as thus limited.[3,4]

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Sayles v. Murphy.

Sections 3823 and 3824 of the Code of Civil Procedure seem to have done away with constructive mileage in computing the fees of constables, [1] and to give him fees only for the distance actually traveled.[2]

(*Decided September*, 1885.)

Appeal by defendant from a judgment of a justice of the peace.

Action against constable for extortion in charging and collecting excessive fees for travel in serving summons and levying under an execution from a justice's court.

The opinion states other facts.

Horace D. Ellsworth, for appellant.

Ledyard P. Hale (*Chamberlain & Hale*, attorneys), for respondent.

KELLOGG, C. J.—This is an appeal by defendant from a judgment of a justice's court against him in an action brought under section 3282 of the Code of Civil Procedure.

Illegal fees were alleged to have been charged and received by the defendant on a summons and execution against plaintiff. For the purposes of this appeal, it will be sufficient to consider the fees charged and received on the execution. On an execution against plaintiff, defendant, as constable, charged $3.20 mileage, or travel fees, and collected $2.98 of it. The execution was issued by a justice at Potsdam village, and was sent by the execution creditor to this defendant by mail at his residence at Canton, N. Y., ten and one-eighth miles distant from the justice's office. Defendant went to execute it to this plaintiff's residence, which was four miles from Canton and nine miles from the office of the justice. After collecting the

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amount of the execution, the defendant returned the execution to the justice, going to his office for that purpose.

The amount of travel fees the constable was entitled to depends upon the proper construction of sections 3323 and 3324 of the Code of Civil Procedure. Those sections limit the fees to the travel necessary to perform the service, and require that the miles charged be actually and in good faith traveled for that purpose.

[1] These provisions seem to do away with constructive mileage in the fees of constables. That it exists in the case of a sheriff is no very good reason why a constable should be entitled to it. The sheriff's office is by law fixed at the county seat. In contemplation of law he is there. To make service there, he must travel from the county seat to the place of service, and the fact that he has deputies elsewhere whom he pays for their service should not lessen his fees. In contemplation of law, then, the sheriff travels the distance for which he gets fees. There is good reason why he should be allowed the fees from his office to and from the place of service, even though in fact the distance is not actually traveled. No good

[2] reason can be seen why a constable should charge fees for travel he does not perform, and section 3324 was intended to give him fees only for distance actually traveled.

[3] Section 3323 provides that the distance is to be computed from the place where the mandate is to be served or executed, or the abode of the person served, to the place where it is returnable, and section 3324 allows travel fees only for the distance actually traveled. In order to give the above provision of section 3323 any effect it must be held to limit the fees for the distance actually traveled, so that they shall not exceed a charge for more miles than from the

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justice's office to the place of execution of the mandate, or abode of the party served, and return. By this rule in this case the traveling fees cannot exceed $1.80.

That would be the fee if a constable of the town of and near the justice's office, had executed the process. The law was undoubtedly intended to prevent a greater charge by giving process to an officer at a distance from the justice's office, and thus to prevent excessive or unnecessary fees. We therefore hold that a constable is entitled to travel fees only [*] for the distance actually and necessarily traveled in executing a mandate, and that no fees are allowed for any travel in excess of the distance (going and returning) from the place of abode of the person served or the place where the mandate is served to the place where it is returnable.

Here the distance actually and necessarily traveled was eight miles. The distance from Canton to Potsdam was also traveled to return the execution. The necessity of this travel is not shown; but if it were allowed, it would make a total of twenty-nine miles traveled, of which only eighteen miles could be charged in computing a travel fee.

If we should consider the mandate as executed at Canton, where the money was paid, instead of at the plaintiff's residence, the result is not materially charged. In that case, the limit of the travel fee would be for twenty-one miles, or $2.10. The amount charged was $3.20, of which, under the most favorable view to the defendant, $2.88 was collected, an overcharge of $1.10, of which 88 cents was collected—an error too small to require correction by an appellate court.

The judgment should be affirmed.

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CASS, RESPONDENT, *v.* HIGENBOTAM, APPELLANT.

N. Y. COURT OF APPEALS, OCTOBER, 1885.

§§ 191, subd. 3, 501, 731, *et seq.*

Appeal.—Jurisdiction of court of appeals where counter-claim interposed. —Instance of cause in which causes of action for conversion properly pleaded as counter-claim in action on contract.—Tender.—When payment into court not necessary.—When pendency of action against pledgee by third person to recover property pledged does not excuse refusal to deliver to pledgor.

Where, in an action to recover $350 on a promissory note, the answer set up a counter-claim for $1,000, the value of certain diamonds pledged with the plaintiff by the defendant as security for the payment of the note, and alleged to have been converted by the plaintiff, and the plaintiff recovered judgment for the amount of the note, —*Held*, that there was no ground for an objection that the court of appeals had not jurisdiction of an appeal from said judgment on the ground that the counter-claim was not properly pleaded, and therefore the amount involved was less than $500;[1] that the claim of the defendant sought to be interposed as a counter-claim would have been a defense by way of counter-claim before the Code and now comes within the provisions of the Code of Civil Procedure.[1]

A tender, after suit brought upon a promissory note, of the amount of the note with interest and costs, upon condition that personal property pledged as security for its payment be returned, is a sufficient tender, and it is not necessary in order to keep it good, to pay the amount tendered into court.[2,3] If the defendant had title to the property pledged, the lien of the plaintiff was by the tender discharged, and he became liable to the defendant for the goods or their value.[2,3]

The Code of Civil Procedure (§§ 731 *et seq.*) has not made any radical change in the law of tender;[4] it refers only to that class of tenders which are considered as satisfying and discharging debts, and has no application to cases where a tender is made of purchase money on condition of the delivery of the deed, and tender of debt on condition of a return of pledge, and cases of similar character.[4]

The obligations of pledgor and pledgee are mutual, concurrent and reciprocal; where either party performs, he is entitled to perform-

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ance by the other as a condition of his own performance; and the refusal of either, where performance is tendered, furnishes ground for an action.[1,2] A tender of performance may always be restricted by such conditions as, by the terms of the contract, are conditions precedent or simultaneous, or proper to be performed by the party to whom tender was made;[3] it may be made at any time and place, and even after suit brought; [4] and where the tender has only the effect of extinguishing the lien and does not discharge the debt, bringing the money into court is not required [5,6] and the debt may be enforced after the lien is discharged.[7]

An objection to an answer setting up a tender after suit brought on the ground that such defense, having arisen after the commencement of the action, could not be pleaded without leave of court, and could only be properly pleaded in continuance of the action and not as a bar, is not well founded where it is not raised until after trial and the rendering of judgment.[8]

Where, in an action upon a promissory note, the defendant interposed a counter-claim for the value of certain diamonds pledged as security for the note, which the plaintiff had refused to deliver upon demand therefor and tender of the debt,—*Held*, that the fact that a portion of the property was claimed by another person and that a suit had been brought for its recovery, to which the defendant had been made a party defendant, furnished no justification for the refusal, [11] and it was therefore a conversion of the property;[10] that the plaintiff as bailee had no right to deny the title of the defendant as bailor if the latter was the true owner of the property;[13] that the plaintiff had a complete remedy by bringing an action in the nature of a bill of interpleader to determine the conflicting claims to ownership, but having failed to do so he was in no position to claim that the action brought against him barred the right of the defendant to counter-claim his demand in this action.[12]

Cass v. Higenbotam (27 *Hun*, 406) reversed.[13]

(*Decided October* 30, 1885.)

Appeal by defendant from a judgment of the general term of the supreme court in the first department affirming a judgment entered on a verdict rendered by direction of the court.

Reported below, 27 *Hun*, 406.

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The action was brought to recover $350, the amount of a promissory note made by the defendant. The answer admitted the plaintiff's cause of action, and pleaded in abatement a tender of the amount claimed with interest and costs to date of tender, made after suit brought, and, by way of counter-claim, that certain diamonds had been pledged by plaintiff to defendant on November 19, 1879, which was after the note became due, as collateral security for the payment of the note; that he had, on January 20, 1880, after the commencement of this action, tendered the full amount due on the note, with interest and costs, and demanded the return of the diamonds and that the plaintiff had refused to accept the tender and return the diamonds, but had converted them to his own use, to the defendant's damage $1,000, for which sum judgment was demanded. The plaintiff served a reply admitting the making of the pledge, but alleging that before the commencement of this action, an action had been brought by Maria L. Higenbotam, the defendant's wife, who claimed to own a part of the diamonds, to recover them, of the commencement of which action the defendant herein had been duly notified, and to which he had become a party defendant; that the plaintiff had at the time of the tender offered to return the diamonds not involved in said suit, upon payment of the note, and the defendant had refused to make such payment and accept such portion.

It appeared on the trial that the facts were substantially as alleged in the pleadings, and that the action brought by defendant's wife to recover a portion of the diamonds was still pending undetermined. It also appeared that the amount of the tender had not been deposited in court. The judge before whom the case was tried at circuit directed a verdict for the plaintiff on the grounds: (1) that under the circumstances the fact that the plaintiff held the diamonds as a pledge

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was no defense; and, (2) that the tender was ineffectual, as it had not been kept good.

Samuel B. Higenbotam (*Lindsay & Flammer*, attorneys), for defendant, appellant.

The tender of debt, interest and costs, as made, divested bailee's lien on the pledge. Kortright *v.* Cady, 21 *N. Y.* 343; Hartly *v.* Tatham, 1 *Keyes*, 222; La Motte *v.* Archer, 4 *E. D. Smith*, 46; Lawrence *v.* Maxwell, 53 *N. Y.* 23; Haskins *v.* Kelly, 1 *Robt.* 173; *Jones on Pledges*, § 542. If bailee was without excuse for refusing to return the property upon tender, he became liable to bailor in replevin, in trover, in assumpsit or, in action for the debt, bailor might recoupe or counter-claim. Stearns *v.* Marsh, 4 *Denio*, 227; *Code Civil Pro.* 501; *Jones on Pledges*, §§ 543, 556. . . . . It is no objection that the counter-claim arose after suit was brought. Willis *v.* Chipp, 9 *How. Pr.* 568. . . . Delivery to a party entitled protects the bailee, and he may defend in the right of such party after such delivery. *Jones on Pledges*, § 568. . . . Bailee can not avail himself of a third person for the purpose of keeping the property himself, or, as is said, "where he has not yielded to paramount title." Bates *v.* Stanton, 1 *Duer*, 79; Western Trans. Co. *v.* Barber, 56 *N. Y.* 544; Stowell *v.* Otis, 71 *N. Y.* 36; Blivin *v.* Hudson R. R. R. Co., 35 *Barb.* 188; S. C., aff'd 36 *N. Y.* 403; Decker *v.* Shelton, 1 *T. & C.* 225; Barnard *v.* Kobbe, 54 *N. Y.* 517; Rogers *v.* Weir, 34 *Id.* 463. . . . He could have brought an action in the nature of a bill of interpleader in equity. His lien on the pledge, he not being a mere stakeholder, did not prevent an action in the nature of interpleader in which he would still hold the rights on the pledge. McKay *v.* Draper, 27 *N. Y.* 256; Ball *v.* Liney, 48 *Id.* 6; Bedell *v.* Hoffman, 2 *Paige*, 199; Cotter *v.* Bank of England, 2 *Dow.* 728; S. C., 3 *Moore & S.* (*Eng. C. P.*) 180; Lucus *v.* London Dock Co., 4 *B. & Ad.* (*Eng. K. B.*) 378.

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William H. Arnoux (*Arnoux, Ritch & Woodford*, attorneys), for plaintiff respondent.

The court of appeals has no jurisdiction over this action, and the appeal should be dismissed. The limitation of the amount involved in an appeal to this court is $500, and the complaint in this action sets forth a cause of action on a promissory note for $350. . . . It will be conceded that if an answer sets up facts concededly true, and that involve more than $500, but which can not be pleaded as a counter-claim, such plea is not sufficient to give this court jurisdiction. Boreel *v.* Lawton, 90 *N. Y.* 293. Upon the doctrine of this case, damages arising from a conversion cannot be counter-claimed against an action on contract. It has been held that in actions for conversion a demand on contracts cannot be set up as a counter-claim. Chambers *v.* Lewis, 10 *Abb. Pr.* 206; aff'd, 11 *Id.* 210; Piser *v.* Stearns, 1 *Hilt.* 86. . . . The only available tender that can be made after action brought is prescribed by 732 of the Code, which requires that in case of such a tender, it shall be made with costs to the time of tender and if not accepted it must be paid into court, and written notice of such a payment must be served upon the attorney within ten days thereafter. In Becker *v.* Boon, 61 *N. Y.* 317, it was held, that in order to make an order before suit available the defendant must pay the money into court and allege that fact in his answer. . . . This being so, as to tender before suit brought, *a fortiori*, it must be so respecting tender after suit brought. See Brown *v.* Ferguson, 2 *Denio*, 196; Sheridan *v.* Smith, 2 *Hill*, 538; Simpson *v.* French, 25 *How. Pr.* 464; *Graham's Prac.* 249, 251; *Tidd's Prac.* 669. . . . A defendant has no right to embody in his answer without leave of court, any matters arising after the commencement of the action; and even if he had, such a matter would properly be pleadable only to the continuance

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of the action, not as a defense or in bar of the action itself. Kunzler *v.* Kohans, 5 *Hill*, 317; Boyd *v.* Weeks, 5 *Hill*, 393; S. C. aff'd, 2 *Denio*, 321; Town *v.* Wilcox, 12 *Wend.* 503; Lebret *v.* Papillon, 4 *East* (*Eng. K. B.*) 502; Lee *v.* Levy, 4 *Barn. & Cres.* (*Eng. K. B.*) 390. So it has been held that where a defendant interposes in an action as a defense matters arising subsequently to the commencement of the action without the leave of the court, the plaintiff may demur to that part of the answer. Morris *v.* Cook, 19 *Wend.* 699; Waldheim *v.* Bender, 36 *How. Pr.* 181. But there is more in this case than a mere technicality on this point. There was in fact no such cause of action against the plaintiff as is set up as a counter-claim in this answer at the time this action was brought. For then the plaintiff was rightfully in possession of the property, as the answer shows; and that possession could not be made unlawful until after a demand and refusal. Wheeler *v.* Allen, 51 *N. Y.* 37. It has been expressly held that the failure to allege that an indebtedness existed before and at the time of the commencement of an action, in a counter-claim, made the pleading bad, because it must appear on the face of the answer that it was an existing claim at the time the action was brought. Heidenheimer *v.* Wilson, 31 *Barb.* 636; Rice *v.* O'Coner, 10 *Abb. Pr.* 362. As a matter of law, the alleged tender, being conditional, was not a valid tender for any purpose. Tuthill *v.* Morris, 81 *N. Y.* 94, 99. The money must be actually produced and offered to the creditor without any condition, or restriction whatever. Brooklyn Bank *v.* De Grauw, 23 *Wend.* 341, and cases cited; Wood *v.* Hitchcock, 20 *Wend.* 47, and case cited; Roosevelt *v.* Bull's Head Bank, 45 *Barb.* 579; Story *v.* Krewson, 55 *Ind.* 397; S. C., 23 *Am. Rep.* 668.

[1] MILLER, J. There is no ground for the contention of the respondent's counsel that this court has

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no jurisdiction over the appeal in this action. The claim of the defendant which is sought to be interposed as a defense to the plaintiff's demands arose out of the contract between them, and was connected with and constituted a part of the transaction. It would have been a defense by way of counter-claim before the Code, and it now comes within the provisions of the Code of Civil Procedure.*

The principal question arising upon this appeal relates to the validity of the tender made by the defendant of the amount due upon the note and his demand of the property which has been pledged as collateral security for the same. This tender was made of the amount of the note, interest and costs, after the commencement of the action, upon condition that the plaintiff return the property pledged. The plaintiff sets up, in reply to the tender, that before the tender was made an action had been commenced against him by the third party for a portion of the property, and the defendant in this action was notified of that action, and had become a party thereto, and that plaintiff, at the time of the alleged tender, had offered to return to the defendant the property for which suit had not been brought, upon payment of the note, but the defendant had refused to accept such portion and to make payment.

The evidence upon the trial established the fact that the diamonds held by the plaintiff were pledged to him by the defendant as security for the payment of a certain promissory note. The plaintiff, therefore, was a bailee of the same, and only had the right to [*] retain them until his debt was paid. Upon payment being made, he was bound to return those goods, and upon refusal to do so became liable to the bailor in replevin or in an action of trover or assumpsit.

* See *Code of Civil Procedure*, § 501.

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If he sued upon the note, the bailor would have a clear right to recoup or counter-claim against his demand the value of the property pledged, if a tender had been made before suit brought. If the action was for the recovery of the goods, then the court no doubt would have the right to make provision that the debt be paid before the property was delivered. Tuthill *v.* Morris, 81 *N. Y.* 95. If the action were for trover, then the debt should be deducted from the actual value of the property pledged.

The tender here was made after the suit was brought and included the principal and interest of the debt and the costs of the action as far as it had proceeded.

[*] Being a conditional tender, and depending upon the return of the property which was demanded, there would seem to be no obligation on the part of the defendant to pay the money into court, as in that event the plaintiff would have been entitled to the money absolutely. He had no right to it without the return of the goods, and as that was refused, no reason exists why the defendant should pay the money into the court. The plaintiff was fully protected with the defendant doing so, as he retained the property in his possession. The obligations of the pledgor and pledgee are mutual, concurrent and reciprocal;

[*] when either party performs he is entitled to performance by the other as a condition of his own performance. The refusal of either where performance is tendered furnishes ground for an action (Holmes *v.* Holmes, 12 *Barb.* 138.) Tender is not

[*] required in such a case by a deposit in court, for the reason that a payment into court is unconditional, and from that time the money becomes the property of the plaintiff absolutely (Becker *v.* Boon, 61 *N. Y.* 332). If a deposit were made without a delivery of the goods, the pledgor might lose his money and afterward fail to obtain his goods, or be

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left to an action for the recovery of the same. A tender of performance may always be restricted by
[*] such conditions as by the terms of the contract are conditions precedent or simultaneous or proper to be performed by the party to whom tender was made (Wheelock *v.* Tanner, 39 *N. Y.* 481). It may also be made at any time and place, and even after suit brought. Where the tender has only the effect of extinguishing the lien and does not discharge the debt, bringing the money into court is not required (Kortright *v.* Cady, 21 *N. Y.* 343); and the debt may be enforced after the lien is discharged.

[*] The Code* has made no radical change in the law of a tender. It refers only to that class of tenders which are considered as satisfying and discharging debts. It has no application to cases where a tender is made of purchase-money on condition of the delivery of the deed, and tender of debt on condition of a return of pledge, and cases of a similar character.

[*] It follows that it was not necessary to bring the money into court to make the tender valid, and if the defendant had title to the property, the lien of the plaintiff on the same was discharged and he became liable to the defendant for the goods or the value thereof.

We have examined the cases cited by the respondent's counsel, which it is claimed sustain a different doctrine in regard to the tender in a case like the present, and we think none of them are the facts applicable to be presented in this case.

[*] The claim that the defendant has no right to embody in his answer, without leave of the court, any matter arising after the commencement of the action, in a case like this, and that the same can only be properly pleaded in continuance of the action, and

* *Code of Civil Procedure*, §§ 731 *et seq.*

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not as a bar, is not well founded. The defendant had clearly a right in a proper manner to set up the defense interposed by answer. Having done so, and the answer having been received and not returned, and so no objection made to the same before the trial, and the plaintiff having allowed the trial to proceed without any objection, and obtained judgment, even if originally it was necessary to apply to the court to set up a defense interposed, it is now too late to insist that it was improperly pleaded because leave was not obtained from the court. By consenting to the proceedings had, the plaintiff acquiesced in their irregularity and waived the objection urged, if it had any merit whatever. He is not in a position now to claim that leave of the court should have been obtained to set up the defense set forth in the answer.

[10] It only remains to be considered whether the conceded facts in the pleadings and the proof upon the trial show a conversion of the property. Unless the refusal to return the property was justified, there was clearly a conversion of the same by the plaintiff, and the defendant had a right of action for the recovery of the value thereof or of the property itself, or to interpose the defense set up by him as a counter-claim to the plaintiff's demands.

We are unable to discover any ground upon which the plaintiff could establish a right to retain the property after a demand if the defendant was entitled to the same as the owner thereof. The fact that a portion of the property was claimed by another person, and that a suit had been brought for a recovery thereof, and that the defendant had been made a [11] party defendant in the said action, furnishes no justification for the refusal. If the defendant was the owner of the property he had a right to it, and the plaintiff was not justified in refusing to comply with his demands for the reason that it was claimed by, and

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suit had been brought for the recovery thereof by a third person. If he unlawfully refused to surrender the goods to the true owner when demanded, he must abide the consequences of his own act. So long as the plaintiff retained possession without right he was liable to the true owner for the same or the value thereof. His delivery to the true owner would have been an entire protection to the plaintiff and complete defense to the action brought against him.

[12] The plaintiff as bailee had no right to deny the title of the defendant as bailor, if he, the bailor, was the true owner of the property. If there were conflicting claims to the same, the plaintiff had a complete remedy by bringing an action in the shape of a bill of interpleader, making the claimants parties thereto, and in that form of an action it could be determined who was the true owner of the property. In that way he could have avoided all risk or hazard. Having thus failed to assert his rights, he is in no position to claim that the action brought against him bars the right of the defendant to counter-claim his demand in this action (Welch *v.* Sage, 47 *N. Y.* 143).

The action brought by the wife of the defendant against the plaintiff, and to which the defendant was made a party, was no protection to the defendant. She had a right to discontinue it at any time. If determined adversely to her, defendant was without any relief whatever. He would still be left to an action against respondent to recover the property or the value thereof, and perhaps to the defense that some other person claimed the property of the plaintiff. The controversy might thus be extended beyond reasonable limits to the defendant's injury if he was the true owner, and possibly to his eventual loss by the long delay. The pendency of this action was clearly no answer to the defense interposed by the defendant.

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By a bill of interpleader the whole matter could have been disposed of in a single action.

[18] It follows that the ruling of the court on the trial that the plea of the tender was not good because the money was not brought into the court and kept there, was clearly erroneous, as well as the decision of the court directing a verdict in favor of the plaintiff.

Judgment should be reversed and new trial granted, costs to abide event.

All concurred, except RUGER, Ch. J., dissenting.

LABLACHE, RESPONDENT, *v.* KIRKPATRICK AND ANOTHER, APPELLANTS.

CITY COURT OF NEW YORK, SPECIAL TERM, NOVEMBER, 1885; AND GENERAL TERM, NOVEMBER, 1885; ALSO, NEW YORK COURT OF COMMON PLEAS, GENERAL TERM, JANUARY, 1886.

§ 2863, subd. 4; § 3228, subd. 3.

Costs—When plaintiff in action on contract who recovers less than $50, *entitled to.*

Where in an action upon an undertaking given on the granting of an injunction to recover damages resulting from the injunction the defendants set up as counter-claims two judgments against the plaintiff assigned to them before suit brought, and it appeared on the trial that the amount of the plaintiff's claim was $349.26 and of the defendant's counter-claims $344.06, and that the plaintiff was entitled to recover $5.20,—*Held*, that the sum total of the accounts between the parties exceeded $400,[2] and therefore the action was not within the jurisdiction of a justice's court,[1] and the plaint-

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iff was entitled to the costs of the action notwithstanding that his recovery was less than $50;[2] that the counter-claims were in no sense payments, but in the nature of set-offs.[3]

Ex parte Mills (10 *Wend.* 557, note); [3] Lamoure v. Caryle (4 *Denio*, 370); [4] Boston Mills v. Eull (6 *Abb. Pr. N. S.* 319;)[5] Griffin v. Brown (35 *How. Pr.* 373);[6] Hayes v. O'Reilly (*Daily Register*, July 1, 1884; S. C., more fully, 8 *N. Y. Civ. Pro.* 347, note); [7] followed.

(*Decided, at special term of N. Y. City Court, November* 17, 1885; *at general term of N. Y. City Court, November* 30, 1885; *at general term of N. Y. Court of Common Pleas, January* 5, 1886.)

Motion at special term of city court of New York by defendant to set aside the taxation of plaintiff's costs, and to require the clerk to tax defendants' bill of costs.

The opinion of McAdam, Ch. J., reported *post*, p. 343, states the facts.

Arnoux, Ritch & Woodford, for the defendants and motion.

William D. Leonard (*Olin, Rives & Montgomery*, attorneys), for the plaintiff, opposed.

[1] Nehrbas, J.—The plaintiff is entitled to costs. The plaintiff's claim was $349.26. The defendants' counter-claims aggregated $344.06. A justice of the peace would not have had jurisdiction; the jury having found for plaintiff for $5.20, thus extinguishing the counter-claims. See Brady v. Durbrow, 2 *E. D. Smith*, 78, 81; Ward v. Ingraham, 1 *Id.* 538.

Motion to tax defendants' costs denied. No further costs of this motion.

From the order denying their motion, entered on this determination, the defendants appealed to the general term of the city court.

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William H. Arnoux (*Arnoux, Ritch & Woodford*, attorneys), for defendants appellants.

Bouvier defines an account as the accounts of an executor, trustee or agent, or the statements of merchants or dealers, showing debts and credits between them. To constitute an action of account, it has been held that the accounts must be open and unliquidated accounts. Abernathy *v.* Abernathy, 2 *Cow.* 413. And further as to what case 2863 applies, see Stilwell *v.* Staples, 3 *Abb. Pr.* 365. Now in the case at bar there were no accounts of both parties; there was nothing open and unliquidated; the defendant's claim was in judgments. Beyond this, it has been held that the demands which make the $400 rule applicable must be demands in dispute and which are established on the trial. *Ex parte* Mills, 10 *Wend.* 557, note. In the case at bar, there was nothing disputed relative to the counter-claim itself. It was simply a question of ownership, as to which plaintiff had no knowledge, and which was proved by the assignment. The exact distinction between the two classes of cases is admirably stated in *Cowen's Treatise*, to which Judge BRADY refers in his opinion in Brady *v.* Durbrow, 2 *E. D. Smith*, 81. Cowen says (7 ed. § 1152). "The plaintiff's claim and the defendant's set-off mentioned in the section of the Code before given, extend to those demands only which are open and unliquidated between the parties," and in section 1137 he further adds, "A claim which must be established, if at all, by an action for an accounting is not one capable of being ascertained by calculation, and in all cases of cross indebtedness arising out of mutual dealings, either party is entitled upon a liquidated debt to him becoming due to have it set off against debts which he owns to the other party."

Stephen H. Olin (*Olin, Rives & Montgomery*, attorneys), for plaintiff-respondent.

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The plaintiff is entitled to costs, of course, upon the rendering of a final judgment in her favor, in an action where, in a matter of account, the sum total of the accounts of both parties, proved to the satisfaction of the justice, exceeds $400. *Code of Civil Procedure*, §§ 3228, subd. 3; 2863, subd. 4. . . . The section does not say "an *action* on account," but "an action where, in a *matter* of account," and the cases defining a "matter of account" are numerous and apt. DALY, J., says: "The case of mutual accounts intended by the statute is where each party has a claim against the other, upon which either party might sue." Brady *v.* Durbrow, 2 *E. D. Smith*, 78, 81. This is precisely the case at bar. Similarly, and exactly in point, is the decision in the case of Ward *v.* Ingraham (1 *Id.* 538), which holds that a case of accounts under the statute arises when the defense seeks to set off items which themselves constitute an affirmative claim in defendant's favor, and which have not been specially appropriated as payments to the reduction of plaintiff's claim. "A plaintiff recovering less than $50 in a court of record is not entitled to recover costs, though his claim established at the trial exceed $200, if it be reduced by payments; if reduced by set-offs, he is entitled to costs." *Ex parte* Mills, 10 *Wend.* 557, note. . . The principle thus clearly announced and definitely established, covers precisely the case at bar, and has been applied by the court in the cases of Boston Mills *v.* Eull, 6 *Abb. Pr. N. S.* 319; Tompkins *v.* Green, 21 *Hun*, 257; Griffen *v.* Brown, 35 *How. Pr.* 373. . . . . Hayes *v.* O'Reilly, *N. Y. Daily Register*, July 1, 1884; S. C., *post*, p. 347.

MCADAM, Ch. J.—The action was commenced to recover $333, damages upon an undertaking executed by the defendant, upon the granting of an injunction in the superior court of the city of New York, in

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an action wherein the plaintiff herein was the defendant. The defendants herein were the sureties upon said undertaking. It was in the sum of $500, and was conditioned that the plaintiff in that action would pay to the defendant therein (plaintiff here) any damages she might sustain by reason of the injunction, if the court finally decided that the plaintiff in that action was not entitled thereto; such damages to be ascertained and determined by the court or by a referee appointed by the court, or by a writ of inquiry or otherwise as the court might direct. The damages were ascertained by the superior court in one of the forms contemplated by the undertaking, and the damages were fixed at $333,—the amount claimed in the complaint herein, and this action is brought to recover the amount so ascertained and determined.

The defense relied upon was a counter-claim against the plaintiff on two judgments which were assigned to the defendants before suit brought. Upon the trial, the plaintiff was allowed the amount of her damages with interest, aggregating $349.26, and the defendants were allowed the amount due upon the two judgments with interest, aggregating $344.06, and for the balance due—$5.20, the court awarded judgment in favor of the plaintiff.

The plaintiff and defendants claimed costs. The clerk taxed the bill presented by the plaintiff, and declined to tax the bill presented by the defendants, and from an order made at special term declining to set aside the taxation in favor of the plaintiff and refusing to direct the clerk to tax the costs in favor of the defendants, the present appeal is taken. The question presented, therefore, is which of the parties litigants, plaintiff or defendant, is entitled to the costs.

Ordinarily, a plaintiff recovering less than $50 cannot recover costs but must pay costs to his adversary, and we are called upon to determine whether the

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present case falls within the general rule, or some exception to it. We will consider the exceptional rules first, because if an exceptional rule applies, the general rule does not.

The Code allows full costs to a plaintiff upon the rendering of a final judgment in his favor (*Code of Civil Procedure*, § 3228) in an action specified in section 2863 of the act (section 3228, *supra*, subdivision 3) without regard to the amount recovered; section 2863 refers to action wherein justices of the peace have no jurisdiction, and subdivision 4 of that section deprives such justice of jurisdiction "where, in a matter of account, the sum total of the accounts of both parties, proved to satisfaction of the justice, exceeds $400;" so that if the present case falls within that subdivision, the plaintiff is entitled to costs, having recovered a final judgment in her favor, and this without regard to the amount thereof. This subdivision, and the one in the former Code* from which it was taken, have already received judicial interpretation.

The subdivision in question does not apply to a case where there are opposite demands and the accounts are connected by originating in the same transaction, and the balance is the debt—because if the plaintiff had given the proper credit, instead of suing on one side of the account only, the balance (if under $50) might have been sued and recovered in a justice's court (Gregory *v.* McArdle, 1 *How. Pr. N. S.* 187).†

But where the accounts are not connected by originating in the same transaction, but the counter-claims or cross accounts of the defendants are disconnected with the plaintiff's accounts, and exist independently of it, it is not a case where the plaintiff is bound to

* *Code of Procedure*, § 54.

† See also, Steele *v.* MacDonald, 4 *N. Y. Civ. Pro.* 227; Benedict *v.* Hale, 4 *Id.* 311.

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know of the counter-claim in the advance, so as to be required to strike a balance for the purpose of bringing the suit within the jurisdiction of a justice's court. This is particularly so in this case, for the counter-claims were probably unknown to the plaintiff when the action was commenced, and exist only by virtue of assignments which the defendants procured, evidently for their protection against the claim of the plaintiff, the amount of which had previously been ascertained and fixed by proceedings in the superior court. The "sum total of the accounts of both parties, proved to the satisfaction of the court, exceeded $400," [*] within the proper intent and meaning of subdivision 4 of section 2863 of the Code, and the plaintiff in our judgment became entitled to costs upon her recovery, though it was but for $5.20. In *Ex parte* Mills (10 *Wend.* 557, note), the court held, that a plaintiff recovering less than $50 in a court of record [*] is not entitled to recover costs, though his claim, as established at the trial, exceed $200, if it be reduced by payments; if reduced by set-offs, however, he is entitled to costs. To the same effect is Lamoure [*] *v.* Caryle (4 *Denio*, 370). The counter-claims pleaded by the defendants were in no sense payments, but in the nature of set-offs. In Boston Mills *v.* Eull, 6 *Abb. N. S.* 319), it was held, that a plaintiff who sues in a court of record in an action arising [*] on contract and for the recovery of money only, and who recovers judgment for less than $50 in consequence of a counter-claim interposed and established by the defendant in the action, is entitled to the costs of the action, provided his claim, together with the defendant's counter-claim, exceeds $400 in amount. [*] In Griffin *v.* Brown (35 *How. Pr.* 373), where the plaintiffs sued to recover of the defendants $500 for the lighterage and storage of grain, and the defendants interposed a counter-claim for more

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than that amount for wasteage and conversion of the grain, and claimed a balance in their favor, and the referee, on adjusting the claims on each side, found in favor of the plaintiffs a balance of five cents, it was held, that the plaintiffs were entitled to costs.

[1] In Hayes *v.* O'Reilly (*Daily Register*, July 1, 1884),* the question was considered by the special term of this court, and after reviewing the cases, it

*For convenience of reference the following more full and complete report of this case is here given.

HAYES *v.* O'REILLY.

CITY COURT OF NEW YORK, SPECIAL TERM, JUNE, 1884.

§§ 2863, subd. 4, 3228, subd. 2.

Costs.—When plaintiff entitled to, on recovering less than $50.

Where, in an action to recover $1,700, rent of certain premises, the defendant set up a counter-claim for $1,400, moneys had and received by mistake by plaintiff from defendant over and above rents due, and plaintiff had a verdict for six cents, and there was nothing in the record to show that the cross demands originated in the same transaction, or that the sum recovered was the balance due,—*Held*, that the plaintiff was entitled to the costs of the action. (*Decided June* 30, 1884.)

Motion for a new taxation of costs.

The action was brought to recover $1,700 balance claimed to be due plaintiff from defendant for the rent of premises at No. 190 Elm Street, N. Y. city, claimed to have been occupied by defendant intermediate January 1, 1871, and May 1, 1876. The complaint alleged that the plaintiff during that period owned the said premises and leased them to the defendant for the annual rent of $1,200, and that all the rent for that term of such occupancy had been paid except the sum of $1,700, for which it demanded judgment.

The answer admitted that the defendant occupied said premises from May, 1869, to April 15, 1876; and that the sum claimed had been demanded. It also alleged payment of all rent due the plaintiff, and that he had conveyed all his right, title and interest in and to the said premises to one Herman Richter by deed dated May 24, 1874, and set up a counter-claim for $1,400, moneys alleged to have been had and received by plaintiff from defendant, over and above rents due, by mistake, intermediate November 1, 1877, and October 1, 1882, and applied by plaintiff to his own use.

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was held, that where the defendant interposed an independent counter-claim of $1,400 to a demand of $1,700, and the counter-claim was extinguished on the trial, the plaintiff was entitled to costs, although he recovered but six cents. The question ought by this time to be considered settled.

The order appealed from was properly made, and must be affirmed, with costs.

HYATT and HALL, JJ., concurred.

From the order of affirmance thereupon entered, an appeal was taken by the defendants to the general term

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William H. Rooney, for defendant and motion.

Charles D. Metz, for plaintiff, opposed.

MCADAM, Ch. J.—Ordinarily, the defendant is entitled to costs, where the plaintiff in an action upon contract, recovers less than $50 (*Code of Civil Procedure*, § 3228, subd. 4, § 3229). But where (as in the present instance) the defendant pleads an independent counter-claim of $1,400 to a demand of $1,700, and the counter-claim is extinguished upon the trial, the exceptional rule laid down in *Ex parte* Mills (10 *Wend.* 557, *note*); Gilland *v.* Campbell (18 *How. Pr.* 177); Parker *v.* Eaton (25 *Barb.* 122); Griffin *v.* Brown (35 *How. Pr.* 372); Boston Mills *v.* Eull (1 *Sweeny*, 359); Brady *v.* Dubrow (2 *E. D. Smith*, 73); Stilwell *v.* Staples (5 *Duer*, 691; 3 *Abb. Pr.* 365), applies. If the opposite demands had originated in the same transaction, the balance found due by the jury (six cents) would have been regarded as the debt; a justice's court would have had jurisdiction of the amount, and the defendant would have been entitled to the costs (Gregory *v.* McArdle, *Daily Reg.* April 12, 1884; S. C., 1 *How. Pr. N.* S. 187). There is nothing in the pleadings or record showing that the cross demands originated in the same transaction, or that the sum recovered was the balance due. No balance had been previously struck, nor had the demands been liquidated. The inference is that they are what they purport to be, viz., independent claims. They aggregated $3,100. A justice's court would have no jurisdiction of an action involving the determination of such demands, and under the Code (§§ 3228, subd. 3, 2863, subd. 4), construed in the light of the authorities cited, the plaintiff was entitled to full costs, although he recovered but six cents

Taxation affirmed.

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of the New York court of common pleas, which affirmed the order appealed from, on the opinion of McAdam, Ch. J. (reported *supra*), Larremore, P. J., and Allen and Bookstaver, JJ., concurring.

Estate of WOLF FERNBACHER, Deceased.

Surrogate's Court, New York County, January, 1886.

§§ 2561, 2577, 2583.

Appeal from decree removing executors—Stay pending.—Amount of costs in surrogate's court.

The operation of a surrogate's decree removing executors and trustees, cannot be prevented by appeal.

An appeal from a surrogate's decree removing executors and trustees is perfected by the giving of an undertaking under section 2577 of the Code of Civil Procedure for $250; the court is not authorized to exact or accept any other undertaking, and until such undertaking has been given, the appeal is ineffectual for any purpose, but the giving of it does not act as a stay.

The authority of the surrogate to award costs and counsel fees in a proceeding for the removal of executors, is limited by section 2561 of the Code of Civil Procedure, and the maximum amount that can be allowed is $70 and $10 for the number of days less two necessarily occupied in the trial or hearing upon the merits.

(*Decided January* 4, 1886.)

Settlement of surrogate's decree removing executors and trustees, and question, submitted to surrogate, as to power to, and mode of staying proceedings pending appeal therefrom.

A motion was made in this matter by certain remaindermen, that the executors, who were also trus-

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tees, under the will of Wolf Fernbacher, deceased, be removed for misconduct and improvident management, and the surrogate of New York county on November 23, 1885, filed an opinion (reported *ante*, p. 308), determining that the motion should be granted. Other facts appear in the opinion.

Jacob Marks, for the remaindermen.

Lauterback & Spingarn, for the executors.

ROLLINS, Surrogate.—I consented to hear the parties to this proceeding before the entry of a decree conformable to my decision of November 23, upon the question whether an appeal from that decree could be made effectual as a stay of proceedings for its enforcement; and if yea, then, in order to secure that result, what should be the penalty of the undertaking. Upon careful examination of the various provisions of article 4, title 2, chapter 18 of the Code of Civil Procedure, I am convinced that the operation of the decree removing the executors and trustees cannot be prevented by appeal; and that, to make an appeal *otherwise* effectual, it is only necessary to give an undertaking under section 2577 for the sum of $250.

Section 2584 provides that a perfected appeal shall operate as a stay "*except as otherwise expressly prescribed in this article.*"

Now it *is* among other things *expressly prescribed* in section 2583 that an appeal from a decree suspending an executor or removing and suspending a testamentary trustee "does *not* stay the execution of the decree or order appealed from." Sections 2578 and 2579 make special provision for the exacting of extraordinary security in the cases in such sections referred to, and section 2580 indicates the mode of ascertaining the amount of the security to be exacted in *those* cases, and in those cases only.

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In the third paragraph of that section, which begins with the words, "in every other case it must be fixed by the surrogate," the word *it* refers, not *generally*, to "the sum specified in an undertaking," but *particularly* to "the sum specified in an undertaking executed as prescribed in either of the last two sections" (2578 and 2579).

In the cases provided for in sections 2578 and 2579 the appeal is perfected by giving the special security, and thereupon proceedings are stayed by the operation of section 2584. In the cases for which section 2583 makes provision, though the appeal is not effectual for any purpose until the $250 undertaking has been given, there is no provision for exacting or accepting any *other* undertaking than that, and the giving of that does not effectuate a stay.

As to costs and counsel fees I have repeatedly called attention to the fact that the authority of the surrogate is limited by the restriction of section 2561. The maximum amount is $70 and $10 for the number of days less two necessarily occupied in the trial or hearing upon the merits. (Walton *v.* Howard, 1 *Dem.* 103; Dubois *v.* Brown, 1 *Id.* 317).*

The affidavit filed by counsel does not afford me sufficient information for ascertaining what sums can be allowed. Let him submit another. I have settled the decree, except as to costs, using the form proposed by the attorney for the petitioner.

* S. C. *sub nom.* Matter of Brown, 65 *How. Pr.* 461. See also Estate of Withers, 2 *N. Y. Civ. Pro.* 162.

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PLACE, AS EXECUTOR, ETC., *v.* HAYWARD.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM, DECEMBER, 1885.

§§ 66, 779

Costs.—Attorney's lien.—When prevents set-off of motion costs against costs of action.

Where an order granting costs and an allowance to the defendant in an action against the plaintiff as executor, but not against him personally, was, on rehearing, reaffirmed by the special term, and the general term affirmed the order thereupon entered, and an appeal by the defendant to the court of appeals from the order of affirmance was dismissed with costs to the plaintiff,—*Held*, that such costs of appeal were motion costs; that the plaintiff's attorney had a lien thereon which attached the instant the costs were due, and which would prevent their being offset against the judgment recovered by the defendant.

(*Decided December* 14, 1885.)

Motion by defendant to amend the judgment recovered by him, in this action, against the defendant, so that the costs of an appeal from an order, awarded plaintiff be offset against the amount recovered, and the judgment reduced *pro tanto* accordingly.

The opinion states the facts.

Josiah Fletcher, for defendant and motion.

Charles F. Wells, for plaintiff, opposed.

O'GORMAN, J.—At the special term of this court an order was made on April 16, 1884, on motion of counsel for defendant, "that an allowance of $500 is granted to the defendant against the plaintiff, as exec-

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utor, together with the costs of this action, costs and allowance not to be paid by plaintiff personally."

On defendant's motion, this order was reconsidered and reaffirmed, and this decision was sustained by the general term.

The defendant appealed to the court of appeals, who, on November 2, 1885, dismissed the defendant's appeal, with $116.02 costs to the plaintiff.

Defendant now moves for leave to amend the judgment in his favor for said allowance and costs so that the amount thereof be reduced by offsetting against it *pro tanto* the $116.02 costs of appeal allowed to the plaintiff.

The plaintiff's counsel, on the other hand, contends that these costs of appeal are the property of the attorney for the plaintiff, and are not subject to any offset in favor of the plaintiff himself. In support of this proposition, he cites Tunstall *v.* Winton, 31 *Hun*, 220 (December, 1883, affirmed by court of appeals, 92 *N. Y.* 646); Marshall *v.* Meech, 51 *N. Y.* 140; Naylor *v.* Lane, 5 *N. Y. Civ. Pro.* 149; *In re* Knapp, 85 *N. Y.* 284; Lachemeyer *v.* Lachemeyer, 17 *N. Y. Weekly Dig.* 310.

The defendant relies on Garner *v.* Gladwin, 12 *N. Y. Weekly Dig.* 9 (Supreme Court, Gen'l Term, March 1881); Hoyt *v.* Godfrey, 3 *N. Y. Civ. Pro.* 118 (Com. Pleas Court, Gen'l Term, November, 1882); Catlin *v.* Adirondack Co., 22 *Hun*, 596.

I have examined these decisions, and in my opinion the weight of authority favors the conclusion that the attorney has a lien on motion costs ordered in favor of his client, and as equitable assignee thereof, which lien attaches the instant the costs are due. That the costs in this case are motion costs. That they cannot be offset against any costs in the action due by the plaintiff to the defendant. That the plaintiff cannot pay the defendant out of money which legally belongs

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to the plaintiff's attorney. And that these costs are collectible from the defendant under section 779 of the Code of Civil Procedure.

The defendant's motion is therefore denied, with $10 costs.

Estate of JOSEPH B. STEWART, Deceased.

Surrogate's Court, New York County, December, 1885.

§§ 2432 *et seq.*

Supplementary proceedings.—Lien acquired by, how enforced after death of judgment debtor.

Where, pending the examination of a judgment debtor in proceedings supplementary to execution in the supreme court, and before a receiver had been appointed or an order directing the application of the debtor's property to the payment of the judgment had been made, an order was granted allowing the judgment debtor to come in and defend, and providing that the "judgment, supplementary proceedings, injunction, &c. stand as security," and thereafter pending the trial the said debtor died and the action was revived and continued against his administrator, and resulted in a judgment against him, and the judgment creditor, claiming to have acquired a lien by the supplementary proceedings upon a claim then owned by the decedent, moved in the surrogate's court that his judgment be paid out of the proceeds thereof which had come into the hands of the administrator,—*Held*, that while, *it seems*, the judgment creditor had acquired a lien by the supplementary proceedings on the said claim and its proceeds, which was not extinguished by the debtor's death, the lien, if any, could not be enforced in the surrogate's court, and the motion should therefore be denied; that if the lien existed the assets in question were, for its enforcement, under the control of the supreme court and, until it is satisfied, not subject to the surrogate's jurisdiction, and relief must be sought in the supreme court.

(*Decided December* 14, 1885.)

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Petition by a judgment creditor, for the payment of his judgment out of the moneys received by the decedent's administrator in settlement of a claim of the decedent against the Kansas Pacific R. R. Co.

The opinion states the facts.

ROLLINS, S.—This decedent died in August, 1882. In November previous, at the suit of this petitioner, a judgment had been recovered against him in the supreme court for the sum of $1,018.58. Execution was at once issued thereon, and a few days later was returned unsatisfied. On December 7, 1881, LAWRENCE, J., made an order in supplementary proceedings, whereby the decedent was "forbidden to transfer or make any other disposition of the property belonging to him, not exempt by law from execution, or in any other manner to interfere therewith until further order in the premises." This order of Mr. Justice LAWRENCE was duly served upon the judgment debtor, who thereafter appeared as directed by such order, and was sworn and in part examined.

Pending an adjournment of these supplementary proceedings, and on January 10, 1882, an order was made at a special term of the supreme court, upon application of the judgment debtor, allowing him to come in and defend upon certain specified conditions, and directing that the "judgment, supplementary proceedings, injunction, &c., stand as security." A copy of this order was served upon Stewart on January 27, 1882. Pending the trial of the action which ensued, Stewart died. The action was subsequently revived against his administrator, and such proceedings were had that in August, 1883, a judgment was entered in favor of this petitioner for the sum of $1,372.87.

When the supplementary proceedings were commenced, the decedent had a certain claim against the

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Kansas Pacific R. R. Co. Since his death, this claim has been compromised by his administrator, who has received in settlement thereof the sum of about $8,000. I am now asked to direct the administrator to pay the amount of the petitioner's judgment. The respondent claims that all funds that have come to his hands have been necessarily expended by him in defraying the reasonable expenses of administration. The petitioner insists that even such expenses should be held subordinate to his claim, and in support of his contention cites Storm *v.* Waddell, 2 *Sandf. Ch.* 494; Edmonston *v.* McLoud, 16 *N. Y.* 543; Brown *v.* Nichols, 42 *N. Y.* 26, and Lynch *v.* Johnson, 48 *N. Y.* 27.

There can be no doubt that if the lien which the judgment creditor acquired by the commencement of supplementary proceedings had been in the decedent's lifetime perfected by the appointment of a receiver, the receiver's title as trustee of such creditor would have been perfect as against an administrator appointed after decedent's death (Chautauqua Bank *v.* Risley, 19 *N. Y.* 369; Bostwick *v.* Menck, 40 *N. Y.* 383; Becker *v.* Torrance, 31 *N. Y.* 631; *Code of Civ. Pro.* § 2468).

Sections 2447, 2448 and 2449 of the Code provide that where it shall appear from testimony in proceedings supplementary, that property of the judgment debtor is in the possession or under the control of himself or some other person, the judge by whom the order or warrant was granted, or to whom it is returnable, may, in his discretion, there being no receiver, make an order directing the judgment debtor or such other person to deliver such property to the sheriff. When so delivered, the property is to be treated as if it had been levied upon by virtue of an execution. Where there is a receiver, the judge is authorized to direct the sheriff to pay to him the moneys or proceeds of property that have come to his hands in the special

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proceeding, &c., or if it appears to the judge's satisfaction that the services of a receiver are not necessary, he may, by an order reciting that fact, direct the sheriff to apply the money or proceeds upon an execution in favor of the judgment creditor.

Now this petitioner's proceedings in the supreme court have never culminated either in the appointment of a receiver or in the entry of such an order as is contemplated by the Code.

In Edmonston *v.* McLoud (*supra*), HARRIS, J., pronouncing the opinion of the court of appeals, in a case arising under the former Code of Procedure, whose provisions as regards the question here presented are not essentially different from those now in force, said: "By the commencement of the proceedings supplementary to execution against his judgment debtor, the plaintiff acquired an inchoate lien upon his interest in the lot purchased of Woods. But to perfect this lien and secure the benefit of his proceedings, it was necessary that he should obtain an order under section 297 of the Code directing the property of his debtor to be applied in satisfaction of his judgment, and also procure the appointment of a receiver to carry that order into effect."

In Becker *v.* Torrance (31 *N. Y.* 631), Judge JOHNSON declared (p. 641), that "the proceeding supplementary to execution is a proceeding for the discovery and sequestration of a debtor's property for the purposes of satisfying and discharging the judgment, and no right is acquired as against other creditors pursuing different remedies until the appointment of a receiver."

It was said by EARL, J., in Brown *v.* Nichols (*supra*) that the lien that a judgment creditor obtains by commencing an action in the nature of a creditor's bill to collect a judgment, is not divested by the death of the

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debtor, and that the debtor's property passes to his personal representatives, subject to such lien.

In Lynch *v.* Johnson (*supra*) the commission of appeals held that the commencement of a proceeding under section 294 of the former Code gave a creditor an immediate lien, and was to be regarded as an "actual levy upon the equitable assets of the debtor." It is clear, upon reference to the opinion of EARL, C., that he did not intend by this language to assert any broader doctrine than had already been pronounced in Storm *v.* Waddell and in Brown *v.* Nichols, the two cases cited in its support.

In proceedings supplementary there is nothing corresponding to "actual levy" until the appointment of a receiver or the entry of an order directing the application of the property involved for the benefit of the party instituting the proceedings.

I think, therefore, that this petitioner must apply for relief to the supreme court. If his claim to priority is well founded, it is because the equitable assets of his decedent were, in decedent's lifetime, locked up in his own hands by the injunction, and, since his death, have continued to be under the control of the supreme court for enforcing the lien of petioner's judgment.

The petitioner virtually says in his appeal to the surrogate: "The funds that have come to the respondent's hands as assets of this estate are, as such, distributable by him among creditors less vigilant than myself only so far as they may exceed the amount of my judgment; a sum sufficient to meet that judgment belongs to me in the first instance."

Now this proposition may very likely be sound; but if it is, then, until the petitioner's claim is satisfied, the assets in question are not subject to the jurisdiction of the surrogate at all.

It seems to me that in this respect there is a close

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analogy between the effect of proceedings supplementary and that of proceedings for attachment.

In Thacher *v.* Bancroft (15 *Abb. Pr.* 243), it was held by INGRAHAM, P. J., that, by the allowance of an attachment, a plaintiff acquired a right in the property attached not to be defeated by the death of the debtor, if the action survived and the court had power to continue it against the debtor's representative. It was further held that after the death of a debtor the court in which judgment might be recovered against his representative could issue execution thereon, and that the action could proceed in that court, irrespective of the provisions of law respecting the issuance of execution by surrogates, &c.; that the execution was but a continuance of the attachment, and was necessary to secure the devotion of the attached property to the payment of the debt for which it was liable.

The application of this petitioner must therefore be denied. No costs to either party.

KRAFFT, APPELLANT, *v.* WILSON, IMPLEADED, ETC., RESPONDENT.

CITY COURT OF NEW YORK, GENERAL TERM, DECEMBER, 1885.

§ 3229.

Costs.—Power of court to award—When successful defendant cannot recover.

The power of the court to award costs emanates from the statute, and they cannot be awarded in the absence of authority for awarding them.[1] At common law they could not be awarded, but were recoverable only by statute.[1]

Where two defendants who were not united in interest joined in an answer, and one was successful and the plaintiff recovered judg-

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ment against the other,—*Held*, that costs could not be awarded the successful defendant;[4] that where a plaintiff recovers against one or more defendants, a defendant who succeeds in the action can recover costs only where he is not united in interest with the unsuccessful defendants and makes a separate answer.[2,4]

Allis *v.* Wheeler (56 *N. Y.* 50);[3] Park *v.* Spaulding (10 *Hun*, 128) [5] followed.

(*Decided December* 21, 1885.)

Appeal by plaintiff from an order affirming a taxation of costs in favor of the defendant and refusing to modify the judgment entered therefor.

The opinion contains a sufficient statement of the facts.

Denis A. Spellissy, for the plaintiff-appellant.

But where the defendants unite in an answer or where they are united in interest, the sole successful one cannot be awarded costs at all. *Code of Civil Procedure*, § 3229.

The answers were joint, and the defendants united in interest here—one being sued as the trustee of an express trust, the other as the beneficiary thereof. *Code of Civil Procedure*, § 449; Mead *v.* Mitchell, 5 *Abb. Pr.* 106; aff'd 17 *N. Y.* 210. The conditions upon which a successful defendant whose co-defendant has been defeated can have costs against plaintiff, are "(1st.) that the successful defendant be not united in interest with those against whom the plaintiff recovers, (2d.) that they make a separate defense by separate answers; and (3d.) that the court award costs to the successful defendant." Park *v.* Spaulding, 10 *Hun*, 128; Allis *v.* Wheeler, 56 *N. Y.* 50. Even if different attorneys appeared for the defendants, interposing identical answers, the successful defendant could not be awarded costs. Williams *v.* Cassaday, 22 *Hun*, 180. And see Van Tuyl *v.* Parker, 22 *Hun*, 464.

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James C. Quinn, for defendant-respondent.

McAdam, Ch. J.—The action was commenced upon a bank check drawn by "Robert Wilson, trustee," one of the defendants. The co-defendant H. Josephine Wilson was made a party, on the allegation that Robert Wilson was her trustee, and that in making the check he acted on her behalf and for her benefit. It was neither in law nor in fact the joint check of both defendants, but the individual obligation of Robert Wilson, the term "trustee" being merely *descriptio personæ*, the *cestui que trust* not being in any manner liable upon it.

Upon the trial, the plaintiff recovered a verdict against Robert Wilson individually, but as to H. Josephine Wilson, the *cestui que trust*, the complaint was dismissed, "with costs." The plaintiff entered judgment on the verdict against Robert Wilson, "with costs," and the defendant, H. Josephine Wilson, had her costs taxed by the clerk, and from an order denying a motion to set aside the taxation the present appeal is taken. The question to be considered on this appeal is as to the power of the trial judge to allow costs to the defendant, who was successful at the trial, because, if the court had no discretionary power in the premises the award of costs and the taxation which followed were all without authority, and the application to set aside the taxation ought to have been granted. By the common law, costs were not awardable, and were recoverable only by action [1] (Downing *v.* Marshall, 37 *N. Y.* 380). The power to award costs emanates from the statute, and authority for awarding them must be found in the Code, or they cannot be awarded.

The rule that where the plaintiff does not succeed as to costs they go, as of course, to the defendant, has its exceptions—one of which will be found in section

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3229 of the Code, which, among other things, provides that in "an action against two or more defendants, wherein the plaintiff is entitled to costs against one or more, but not against all of them, none of the defendants are entitled to costs of course. In that case costs may be awarded, in the discretion of the court, to any defendant against whom the plaintiff is not entitled to costs, where he did not unite in an answer and was not united in interest with a defendant against whom the plaintiff is entitled to costs."

The defendant, H. Josephine Wilson, was not united in interest with Robert Wilson, and is entitled to costs, unless the circumstance that she united with her co-defendant in an answer to the complaint, instead of interposing a separate answer thereto, prevents the court from making the discretionary award of costs contemplated by the section cited. Section 3229 (*supra*), is taken from sections 305 and 306 of the former Code of Procedure, which contained similar language. These sections were considered by the court of appeals in Allis *v.* Wheeler (56 *N. Y.* 50),
[*] which held that the right to costs in such cases as the present was confined to those expressly mentioned in the section, *i. e.*, where the successful defendant is not united in interest with those against whom the plaintiff recovers, and where they make separate defenses by separate answers; that the fact of not being united in interest, standing alone, is not sufficient; a separate defense by a separate answer must have been interposed as well, as both of these circumstances must exist before the costs can be awarded.
[*] To the same effect is Park *v.* Spaulding (10 *Hun*, 128), and the codifiers say that they intended section 3229 (*supra*), as adopted by the legislature, to be in accordance with the law as laid down in Allis *v.* Wheeler (*supra*), and they have, in our judgment, given legal effect to their intention. It follows from

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this interpretation of section 3229 (*supra*), that the [*] defendant, H. Josephine Wilson, though successful in her defense, is not entitled to costs, on the sole ground that she failed to interpose a separate answer, that the court had no power to award her costs, and that the subsequent taxation thereof was unauthorized and should have been set aside upon the motion made for that purpose.

The order appealed from must therefore be reversed, but as the question of interpretation under the present Code is apparently new, the reversal will be without costs (*Code of Civil Procedure*, § 3229).

WALLACE, RESPONDENT, *v.* BERDELL ET AL., APPELLANTS.

COURT OF APPEALS, DECEMBER, 1885.

§§ 1323, 1497, 1531.

*Mesne profits.—What are.—Amount recoverable as.—Proceedings for restitution of real property after reversal of judgment ordering sale thereof.**

Where the opinion on a motion in the court of appeals for restitution of real property sold under a judgment in a judgment creditor's action which had been reversed by said court, after holding that the remittitur should be amended by inserting a direction for the immediate restitution of the real estate in question, held further that the mesne profits of the said real estate up to the time of such restitution be ascertained, and paid "by the plaintiff to the defendant C. P. B.," and the order entered thereon, instead of following

* See *Code of Civil Procedure*, § 1323, authorizing restitution on reversal of judgment.

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the words of the opinion, provided that the directions should be that the value of rents and profits, &c., be ascertained,—*Held*, that the intention of the court was to provide for the same compensation to the defendant for withholding from him possession of his real estate, to which he would have been entitled on recovering the same in an action of ejectment,[1] and that there was no difference in substance or effect between the language of the opinion and that of the order;[1,3] that the mesne profits consist of the net rents, after deducting all necessary repairs and taxes, or the net rental value or the value of the use and occupation.[4] Also *Held*, that a provision in the order that the restitution and payment ordered be without prejudice to the right of the defendant "C. P. B." to commence and maintain any suit or proceeding for waste or injury to the property, determined no question in relation to any such action but left the parties to their legal rights, whatever they might be; and that while the provision was superfluous, as such damages could have been recovered in the proceedings for restitution, there was no occasion for amending the order in that respect.[5]

The common law and statutory rules as to the recovery of mesne profits in action of ejectment or after recovered therein, stated.[2]

(*Decided December* 8, 1885.)

Motion by plaintiff for the recall of the remittitur herein for the purpose of having it corrected.

This action was originally brought by Francis B. Wallace and John F. Phillips, composing the firm of F. B. Wallace & Co. Said Phillips died pending the action, and it was continued by Wallace as surviving partner. He died pending the appeal, which was revived and continued by the present plaintiff, his executrix. The original plaintiffs in this action, having levied an attachment in an action against the defendant Robert H. Berdell upon certain real property in Orange county, and thereafter having recovered judgment in such action against said defendant, issued an execution thereon. They then commenced this action to set aside and have declared null and void as to them two certain deeds conveying the real estate so attached, to the defendant Charles P. Ber-

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dell; to establish their lien thereon, and for other relief. Judgment was rendered herein, by the trial court setting aside such conveyances, establishing the lien of the attachment, and directing the sheriff of Wayne county to sell the attached property or so much thereof as might be necessary to pay the costs of this action and the judgment in the action in which the attachment was issued. A sale of the said real property was thereafter made by said sheriff under said judgment to F. B. Wallace (now deceased) and Ambrose S. Murray, as trustee for the creditors of the defendant Robert A. Berdell. The judgment directing such sale was subsequently reversed by the court of appeals (*Vide* Wallace *v.* Berdell, 97 *N. Y.* 13), and thereafter a motion for restitution made by the defendant Charles P. Berdell, under section 1323 of the Code of Civil Procedure which was granted (*Vide* opinion, *sub nom.* Murray *v.* Berdell, 98 *N. Y.* 480).

Other facts appear in the opinion here reported.

Henry Bacon, for the plaintiff-respondent, and motion.

Alfred Taylor, for defendant-appellant, opposed.

RAPALLO, J.—The opinion in this case on the motion for restitution, after holding that the remittitur should be amended by inserting a direction for the immediate restitution of the real estate in question, held that there should be inserted a further direction that the mesne profits of said real estate up to the time of such restitution be ascertained and be paid by Ambrose S. Murray to Charles P. Berdell (See Murray *v.* Berdell, 98 *N. Y.* 480).

The order entered upon the decision of the motion, instead of following the words of the opinion, provided that the directions should be that the value of rents and profits, &c., be ascertained.

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The counsel for Mr. Murray seems to be apprehensive that this deviation from the language of the opinion may subject his client to liability for the gross rents, or rental value of the property, without any allowance for amounts paid by him for taxes and necessary repairs, etc., and he now moves for a recall of the remittitur for the purpose of making the direction conform to the language of the opinion.

[1] The intention of the court was to provide for the same compensation to the defendant for withholding from him possession of his real estate, to which he would have been entitled on recovering the same in an action of ejectment, and we see no difference in substance or effect between the language of the opinion and that inserted in the order.

Whatever uncertainty there may have been in former times as to rule of damages in an action for mesne profits has been removed by the provisions of the Revised Statutes and of the Code of Civil Procedure and the decision thereon.

[2] At common law, the action for mesne profits after recovery in ejectment was in the form of an action of trespass; and although the general rule was that the plaintiff was entitled to recover in such an an action the annual value of the land, it was held in some cases that he was not confined to that, and it was said by the court in Goodtitle *v.* Tombs (3 *Wilson* [*Eng. C. P.*] 118): "The plaintiff is not confined in this case to the very mesne profits only, but he may recover for his trouble. I have known four times the value of the mesne profits given by a jury on this sort of action of trespass. If it were not so, sometimes complete justice could not be done to the party injured."

In Jackson *v.* Loomis (4 *Cow.* 168), which was an action of trespass for mesne profits after a recovery in ejectment, it was held that a defendant whose possession was *bona fide* was entitled to be allowed in miti-

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gation of damages the value of permanent improvements beneficial to the freehold made in good faith. The court, by SAVAGE, Ch. J., after stating that it could find no case in point either in this country or in England, cited in support of its decision, from the opinion of KENT, J., in the court of errors, in Murray *v.* Gouverneur (2 *Johns. Cas.* 441), "As to the sum expended for repairs, it may be left for liquidation in an action for mesne profits if the respondents should think proper to sue for rents and profits. The action for mesne profits is a liberal and equitable one, and will allow of every kind of equitable defense." The Revised Statutes (2 *R. S.* 310, § 44, *et seq.*), substitute in place of the action of trespass for mesne profits a suggestion to be entered on the record of the judgment in ejectment, and direct that such judgment suggestion be in the form in use for a declaration in an action for use and occupation. Section 48 requires the plaintiff to prove on the trial of the issue to be framed on such suggestion the value of the mesne profits, during the time for which the plaintiff is entitled to recover, and by section 49, allowances are directed to be made for permanent improvements and for the value of their use.

In Woodhull *v.* Rosenthal (61 *N. Y.* 382), the rule of damages is stated by DWIGHT, Com'r, to be the rental value of the premises recovered, and the whole subject is provided for by the Code of Civil Procedure, which provides (§ 1496), that in an action to recover real property or the possession thereof, the plaintiff may demand in his complaint, and in a proper case recover damages for withholding the property, and (§ 1497), that "those damages include the rents and profits, or the value of the use and occupation of the property, where either can be legally recovered." And section 1531 uses the same language as to the amount of damages allowed in ejectment, viz.: "The rents

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[*] and profits or the value of the use and occupation of the real property recovered," so this may be regarded as the legislative definition of the ancient technical term "mesne profits" used in the opinion. The term "value of rents," employed in the order, does not essentially depart from this definition.

It would be manifestly unjust to confine the owner of the property withheld from him to the rents actually received by the party required to make restitution. The owner should have either those rents or the rental value as may be just under the circumstances. In either case, payments necessarily made for taxes and ordinary repairs would be involved in ascertaining the rents received or the rental value.

[*] The mesne profits consist of the net rents after deducting all necessary repairs and taxes, or the net rental value, or the value of use and occupation, That is all of which the party from whom the possession has been withheld, has been deprived. For this he should be made whole, and he should not suffer from any mismanagement, negligence or improvident expenditure by the party in possession. On the other hand, he should not be relieved from any necessary diminution of the gross rents or rental value or gross value of the use and occupation to which he would have been himself subjected had he not been disturbed in his possession.

The amounts justly chargeable for the rents which the owner derived, or might with reasonable diligence have derived, from the property, and the amount of expenditures which have been properly made, and which the owner would have been obliged to make had he remained in possession, are matters to be determined by the referee.

The order contains a further provision, which was not contained in the opinion, viz.: That the restitution and payment ordered be without prejudice to the

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right of Charles P. Berdell to commence and maintain any suit or proceeding for waste or injury to the property, etc.

[*] This provision determines no question in relation to any such action, but leaves the parties to their legal rights, whatever they may be. That, under certain circumstances, such an action may be brought after recovery in ejectment, was decided by the court of errors in Dewey *v.* Osborn, 4 *Cow.* 329. The provision in the order was perhaps superfluous, as such damages could have been recovered in the proceeding for restitution. It was not intended to deprive Mr. Berdell of such right of action if he had any, and we see no occasion for amending the order in that respect.

The motion should be denied, without costs.

All concurred.

MOFFATT AND ANOTHER, RESPONDENTS, *v.* HERMAN, IMPLEADED, ETC., APPELLANT.

CITY COURT OF NEW YORK, SPECIAL TERM, NOVEMBER, 1885, AND GENERAL TERM, JANUARY, 1886.

§§ 14, 2284.

Contempt.—Perjury is a. —Punishment.

Perjury is, and has always been held to be a gross contempt.[1,2,3]

Stackhouse *v.* French (1 *Bing.* [*Eng. C. P.*] 365), distinguished.[4]

The power which courts have possessed from time immemorial to punish contempts has not been taken away or limited by statutory enactments, but the mode of punishment in certain cases has been prescribed by statute.[5]

A defendant who has sworn to and interposed a false answer is guilty of a contempt of court, [*] and if a right or remedy of a party

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was thereby defeated, impaired, impeded or prejudiced, his offense may be punished under Code of Civil Procedure, § 14, subd. 3, as a case where an attachment or any other proceeding to punish for a contempt has been usually adopted and practiced in a court of record to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party,[6] or it may be punished under subdivision 2 of that section as a deceit or abuse of a proceeding of a court by a party.[7]

The city court of New York, being a court of record, although of limited jurisdiction, has power to punish for a contempt committed by swearing to a false answer in an action therein.[8, 10]

Rutherford v. Holmes (5 *Hun*, 319; aff'd, 66 *N. Y.* 368), distinguished.[9]

Where a defendant in an action interposed a false answer verified by him, and the next day after serving it so disposed of property more than sufficient to pay the plaintiff's claim, that it was, if not beyond the reach of the plaintiff, at least difficult to reach, and it appeared that if the answer had not been interposed the judgments afterwards recovered by the plaintiff by default, could have been entered and become a lien on such property before the deed conveying it was recorded, or the amount of the judgment made out of the consideration for such deed before it was disposed of, and that a co-defendant jointly and severally liable with such defendant for the plaintiff's claim was insolvent,—*Held*, that the plaintiff's right to an immediate judgment against the defendants and their remedy for the collection of the same by the ordinary process of the court were impaired, impeded, prejudiced and defeated by the verification and service of the false answer, and such misconduct of the defendant caused an actual loss to the plaintiffs in the amount of the judgment and costs of supplementary proceedings.[11]

In such a case, the court is restricted, in imposing a fine as an indemnity to the injured party, to the actual loss produced by the misconduct complained of,[12] but the fact that the plaintiffs might, by the appointment of a receiver and by creditors' bill and other long and tedious proceedings, collect the whole or part of their judgment furnishes no just ground for denying their right to indemnity by the more speedy and direct means of a fine or imprisonment.[13]

Sudlow v. Knox (7 *Abb. Pr. N. S.* 411); De Jonge v. Brenneman (23 *Hun*, 332); King v. Flynn (37 *Id.* 329), distinguished;[12] Clark v. Binninger (75 *N. Y.* 344), followed.[14]

(*Decided, at special term, November* 28, 1885; *at general term, January* 22, 1886.)

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Motion made at special term by plaintiffs in proceedings supplementary to execution for an order adjudging the defendant Herman guilty of a contempt of court in verifying and serving a false answer herein.

The facts are sufficiently stated in the opinion reported below

William J. Fanning, and *Michael J. Kelly*, for plaintiffs and motion.

M. L. Townsend, for defendant, opposed.

NEHRBAS, J.—This action was brought upon a promissory note made by the defendants to their own order, and by them indorsed over to the plaintiffs for value. The defendant Herman denied "that the defendants duly or otherwise indorsed said note (mentioned in the complaint) under and by their said firm name, and thereupon or at any time for value received or otherwise transferred said note to said plaintiffs." The answer was verified March 2, 1885, and a copy served on the following day. A motion to advance the cause was not opposed, and on March 20, 1885, the cause appeared upon the day calendar, and plaintiffs took an inquest—no one appearing for the defendants. The plaintiff had brought witnesses from Buffalo and College Point, in this State. The executions issued upon the judgment were returned unsatisfied by the sheriffs of New York and Queens counties. In the proceedings supplementary to execution the fact was brought out that the defendants had on or about March 1, 1885, sold out, by deed of conveyance and bill of sale, all their brewery property, to the Hirsch and Herman Brewing Company, receiving in payment two thousand shares of the capital stock of that company, of the par value of $100 a share, of which the

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defendant Herman obtained one-half, which stock he thereafter pledged as security for debts due by the defendant Herman and the firm of Hirsch and Herman. A deed of the real estate and brewery property of the defendants at College Point was on March 4, 1885, recorded in the Queens county clerk's office, which deed was executed by the defendant Herman, with his partner Hirsch, to the Hirsch and Herman Brewing Company. This was done one day subsequent to the service of the answer. The defendant Hirsch is apparently insolvent.

From the affidavits and papers submitted it plainly appears that the denial contained in the answer hereinbefore referred to was false and untrue, and was known to the defendant to be so false and untrue, at the time he verified his pleading.

[1] It is obvious from the foregoing facts and circumstances that the defendant Herman has been guilty of gross misconduct, by which the rights and remedies of the plaintiff have been impaired, prejudiced and impeded, and, it seems, entirely defeated, for nothing has been paid upon the judgment.

[2] The defendant relies solely upon his claim that this court has no power to punish for contempt under these circumstances, and cites the case of Rutherford *v.* Holmes (5 *Hun*, 319; affirmed by the court of appeals in 66 *N. Y.* 368), as in point. That case has reference to a justice of the peace and to courts of inferior jurisdiction, but does not apply to courts of record. In other words, defendant contends that he may deliberately commit perjury in order to obtain sufficient delay to put his property out of the reach of the plaintiff, and then defy the latter to collect his judgment. Is this court powerless to punish such outrageous conduct? Under section 14 of the Code of Civil Procedure, this court has ample power to punish

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as for a contempt such gross abuse of a pleading which has resulted so disastrously to the plaintiff.

The defendant will be fined the full amount of the judgment, $1,057.32 and interest, besides $75 as costs and disbursements subsequent to the recovery of the judgment, and he will be committed until the fine is paid.

From the order entered on this decision the defendant appealed to the general term.

M. L. Townsend, for defendant-appellant.

The act of the defendant, Herman, in putting in the answer to the complaint, even assuming that the denial in the answer was false and that he was guilty of perjury in swearing to it, was not a contempt of court; and the special term judge acted improvidently and without authority of law in so determining, and the whole proceeding is *coram non judice*.

(1.) The only power which the court possesses to punish for contempt is conferred by statute, and is prescribed by section 14 of the Code of Civil Procedure. These provisions are substantially the same as the provisions of the Revised Statutes. . . .

The act complained of does not come within any of the provisions of section 14 of the Code of Civil Procedure, and we confidently assert that never before in the history of jurisprudence has it been held that putting in a false answer was a contempt of court; or that falsely swearing to an answer in a civil action was a contempt of court. . . .

If it is claimed that the alleged contempt comes under the second subdivision of section 14, we answer that we are unable to see the application. We understand the section to apply to putting in fictitious bail or a fictitious surety; and all the cases cited by plaintiffs' counsel are cases of that class. We know of no

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case where it was ever held that putting in a false answer was a deceit or a contempt of court. Before the Code, a defendant always had the right to plead the general issue, and his answer was never stricken out as sham,—*i. e.*, false. The provisions of the Code requiring answers to be verified in certain cases has not changed the rule or the right of the defendant. A general denial, although sworn to, cannot be stricken out as sham, or false, upon *ex parte* affidavits. Wayland *v.* Tysen, 45 *N. Y.* 281; Thompson *v.* Erie R. R. Co., 45 *Id.* 468. If a court cannot strike out upon *ex parte* affidavits a general denial as sham, can it, upon *ex parte* affidavits, after judgment, adjudge that the answer was false and that the party was guilty of perjury, and, thereby, of contempt in putting it in? We say not.

If it is claimed that the special term judge derived his authority to adjudge the defendant guilty of contempt under subdivision 8, of section 14, of the Code of Civil Procedure, we answer that an order to show cause in a case like the present, "has not been usually adopted and practiced in a court of record," and that it was never adopted before, so far as we have been able to find by our examination of authorities. . . . . The special term judge erred in assuming his right or jurisdiction summarily upon *ex parte* affidavits to determine the truth or falsity of defendant's answer, and in so doing to find that the defendant had been guilty of false swearing or perjury, and had thereby committed a contempt of court. . . . . In the case of Davis *v.* Am. Society, etc. (75 *N. Y.* 362), it is held that "the guilt of a person accused of a crime is to be determined in a common law court by a jury; and the people, as well as the accused, have a right to have it so determined."

There is a class of cases where some of the courts have undertaken summarily, upon *ex parte* affidavits,

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to adjudge that a surety or bail was guilty of contempt where the surety was fictitious and the affidavit of justification false. They are the cases of Hull *v.* L'Eplatinier, 5 *Daly*, 534; Egan *v.* Lynch, 3 *N. Y. Civ. Pro.* 236; Stephenson *v.* Hanson, 6 *Id.* 43.

In all these cases it will be seen that the judges in their opinions have cited the case of Stockham *v.* French (1 *Bing.* [*Eng. C. P.*] 365). By examining this case, it will be seen that there was an application to the court for a rule to punish bail for false swearing; and the court says: PARK, J.: "Perjury is undoubtedly a great contempt; but a contempt can only be visited summarily while the parties are yet in view of the court. At present the plaintiff's only remedy is by indictment;" and, BURROUGHS, J.: "This is a charge of perjury against the bail; but we cannot proceed on affidavits in such a matter. It must be tried by indictment." In the case of State *v.* Terence (*The Reporter* Vol. XX. p. 650), a witness was found by the trial judge to have committed perjury, and was committed as for a contempt; upon *habeas corpus* he was discharged, the court holding that perjury by a witness is not a contempt of court, and that he could only be punished criminally by indictment. . . . .

The special term judge erred in imposing a penalty of the amount of the judgment recovered by plaintiffs in the action, to wit: $1,057 and interest, and $75 including costs of supplemental proceedings. . . . . The power of the court to impose a fine is fortunately limited and restricted by statute. Section 2284 of the Code of Civil Procedure provides that if an actual loss or injury has been produced to a party, &c., a fine sufficient to indemnify a party must be imposed. It is further provided that where it is not shown that such a loss or injury has been produced, a fine must be imposed not exceeding the amount of the complain-

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ant's costs and expenses, and $250 in addition thereto. In this case, no actual loss or injury was sustained by the plaintiff because of the alleged falsity of the defendant's answer or his alleged perjury in swearing to it. It is well settled under this section of the Code that the amount of the fine to indemnify the person aggrieved for the loss and injury must be fixed upon the proof of the damage sustained, according to the rules of law which would apply in an action for such damages. Sudlow *v.* Knox, 7 *Abb. Pr. N. S.* 411; Dejonge *v.* Brenneman, 23 *Hun*, 332; Clark *v.* Bininger, 75 *N. Y.* 344, 352.

William J. Fanning, for plaintiffs-respondents.

Contempt is, among other things, an abuse of the writ or proceeding of the court; or the perverting of such writ or process to purposes of private malice, extortion or injustice, or such acts as hinder the regular administration of justice; or where a person has committed any offense which is calculated to, or actually does, "defeat, impair, impede or prejudice the rights or remedies of a party to an action or special proceeding brought in the court," etc. *Chase's Blackstone*, 994 and note. In the case at bar, the plaintiffs were entitled to their immediate judgment, if there was no defense to the suit. The effect of interposing this admittedly false answer was to deprive the plaintiffs of that right until March 20, 1885, put them to the trouble and expense of preparing for the trial, by procuring witnesses and coming from Buffalo, and causing them to incur the additional fees of counsel; while in the interval the defendants dispose of their property, or place it beyond the reach of the plaintiffs, become insolvent, and render the judgment of the plaintiffs worthless. Such conduct undoubtedly did defeat and destroy the rights and remedies of the plaintiffs. Yates *v.* Lansing, 9 *Johns.* 417; Eagan *v.* Lynch, 3 *N. Y. Civ.*

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Pro. 236; Stephenson *v.* Hanson, 6 *Id.* 43; Nathans *v.* Hope, 5 *Id.* 401; aff'd at Mch. Gen'l T. 1885; reversed in court of appeals, but upon ground that there was no perjury; 22 *N. Y. Weekly Dig.* 274; S. C., 2 *Eastn. Rep.* 655; Hull *v.* L'Eplatinier, 5 *Daly*, 534; Keating *v.* Goddard;* Perjury is undoubtedly a great contempt of court. Curtis *v.* Smith, 1 *Chitty*

KEATING *v.* GODDARD.

In re DUGGAN, A SURETY.

CITY COURT OF NEW YORK, SPECIAL TERM, SEPTEMBER, 1885.

§ 14.

Contempt.—Falsely justifying as surety on order of arrest punishable as.

Where the affidavit of justification signed and sworn to by a surety to an undertaking on an order of arrest was false,—*Held*, that he was guilty of a contempt of court, and should be fined the amount of a judgment recovered against him on such undertaking.

(*Decided September* 8, 1885.)

Motion that Michael Duggan be punished as for a contempt for signing and swearing to a false affidavit of justification to an undertaking on an order of arrest.

The plaintiff herein, Keating, brought this action against the defendant Goddard, and procured an order for the arrest of said defendant. To procure such order, he gave an undertaking in which Michael Duggan and one O'Keefe were sureties, in the sum of $250, and each signed an affidavit of justification in the usual form to the effect that he was worth $500 over and above all his just liabilities and property exempt by law from levy and sale under execution. Subsequently the order of arrest was vacated, and the defendant Goddard recovered judgment on the undertaking against the plaintiff, and said Duggan and O'Keefe, for $270.18. Execution was issued on said judgment against the several judgment debtors and returned wholly unsatisfied, and proceedings supplementary to execution instituted against said Duggan. It appeared in such proceedings that Duggan's affidavit of justification on the undertaking was false in that he was not at the time of making it worth the sum of $500, etc., and thereupon this motion was made in the action in which the undertaking was given.

Edward S. Peck, for defendant, and motion.

George W. Libbins, for surety, opposed.

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(*Eng. K. B.*) 117; citing Royson's case, *Cro. Car.* (*Eng. K. B.*) 446; A'Beckett *v.* ————, 5 *Taun.* (*Eng. C. P.*) 776; Anon., 1 *Strange* (*Eng. K. B.*) 384; People *v.* Dawson, 15 *Chic. Leg. News*, March 10. 1883; People *v.* Rainforth, cited *Id.*; Stackhouse *v.* French, 1 *Bing.* (*Eng. C. P.*) 365; Hull *v.* L'Eplatinier, *supra*; Egan *v.* Lynch, *supra*; Nathans *v.* Hope, *supra*; Stephenson *v.* Hanson, *supra*; Keating *v.* Goddard, *supra*. In Curtis *v.* Smith, the court (ABBOTT, Ch. J.), say: "But, independent of this (criminal) liability, their conduct is a great contempt of the court itself, for nothing can be more improper than for a person coming in the first instance and saying that which he is not able to maintain on being further examined. False assertions of this kind are very high contempt. Such contempt has been severely punished by the court." The court has the power to punish for contempt: a party to an action for any deceit or abuse of a proceeding of the court (*Code of Civil Procedure*, § 14, subd. 2); or in any case where it has been usually adopted to protect the right of a party. *Id.* § 14, subd. 8; § 2266 and note thereto in Throop's Code. And that, notwithstanding the misconduct, constitutes an indictable offense. *Code of Civil Procedure*, §§ 13, 2287; *In re* Yates, 4 *Johns.* 316; rev'd in People *v.* Yates, 6 *Id.* 335, but upon what ground does not appear. It was, however, upon the point involved here, sustained in Yates *v.* Lansing, 9 *Johns*, 415–418; Curtis *v.* Chitty, *supra*; A'Beckett *v.* ————, *supra*; Anon., *supra*; Hull *v.* L'Eplatinier, *supra*; Eagan *v.* Lynch, *supra*; Nathans *v.* Hope, *supra*; Stephenson *v.* Hanson, *supra*; Keating *v.* Goddard, *supra*. . . . . Not only has the court

BROWNE, J.—Duggan adjudged guilty of contempt, and fined amount of judgment recovered against him, with interest. See Stephenson *v.* Hanson, 6 *N. Y. Civ. Pro.* 48.

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the power, but the law commands the court, to punish the party by fine or imprisonment, or both, if he be found guilty of the misconduct charged, and that it was calculated to, or actually did defeat, impair, impede or prejudice the rights or remedies of a party. *Code of Civil Procedure*, § 2281.

HALL, J.—This is an appeal from an order made by Mr. Justice NEHRBAS, sitting at special term, adjudging the defendant George Herman guilty of a contempt, in falsely swearing to an answer interposed in his behalf in this action, and adjudging that the service of such false answer was calculated to and did impede, impair and defeat the remedies of the plaintiffs, and cause an actual loss to them of the amount of the judgment, and fining said defendant, the amount of the judgment recovered and costs, and directing his imprisonment until such fine is paid.

A careful examination of the pleadings and the papers used upon the motion leads inevitably to the conclusion that the answer is false in every particular, and that said defendant knew it was false when he verified it.

The action was upon a promissory note made by defendant's firm to their own order, and indorsed by them and delivered to plaintiff.

The answer of defendant Herman denies that the defendant duly, or otherwise indorsed said note, and thereupon, or at any time delivered the same to plaintiffs.

The note in question was made by defendants, by Jacob Hirsch, their attorney in fact, and indorsed in the same manner, and delivered by said attorney to plaintiffs, and was a renewal of a previous note which was made and indorsed by defendant Herman in person, for said firm, and which was given for goods sold and delivered by plaintiffs to defendants, for use in

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defendants' business, and defendant Herman, in addition to making the original note, had personal knowledge of the making and delivery of the note in suit.

Therefore, the allegations of the answer were false in stating that the note was not indorsed by defendants, or delivered to plaintiffs, and it was willfully false because defendant Herman in his examination, states that Hirsch had a full power of attorney to make and indorse notes and conduct all the business of the firm, and because he had personal knowledge of the making, indorsement and delivery of the note in suit, and of all the circumstances connected with it; and this disposes of the appellant's contention that he intented by said answer, to put in issue the authority of Hirsch, as attorney, to make, indorse or deliver said note.

I am, therefore, reluctantly but firnly of the opinion that the defendant Herman was guilty of perjury in swearing to said answer, and also of a deceit and abuse of a proceeding of the court.

[*] Perjury has always been held to be a gross contempt, and I have been unable to find any case which holds or intimates the contrary (Stackhouse *v.* French, 1 *Bing.* (*Eng. C. P.*) 365: Hull *v.* L'Eplatinier, 5 *Daly*, 534; Eagan *v.* Lynch, 3 *N. Y. Civ. Pro.* 239; Stephenson *v.* Hanson, 6 *Id.* 43).

[*] It is true that in the case first above cited, a rule to punish for contempt was refused; but that applies only to the remedy, and not to the offense, and the case is cited in all the other cases above mentioned, only as an authority upon the point that perjury is a contempt, and not as to the means of punishment, which are amply provided by our statutes.

[*] The power which courts have possessed from time immemorial, to punish contempts, has not been taken away or limited by statutory enactments, but the mode of punishment in certain cases has been prescribed by statute.

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The offense which defendant has committed may be punished under subdivision 3 of section 14, Code of Civil Procedure, as a case where an attachment or

[*] any other proceeding to punish for a contempt has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party (Hull *v.* L'Eplatinier, *supra*).

[*] Or it may be punished under subdivision 2 of the same section as a deceit or abuse of a proceeding of a court, by a party to an action, provided, in either case, that a right or remedy of a party has thereby been defeated, impaired or impeded or prejudiced.

A greater deceit or abuse of a proceeding than the interposition of a false answer can scarcely be imagined. The object and province of an answer is to apprise the court and the opposite party of the issue presented for trial; but if the averments of a complaint are true there cannot, without deceit, be an issue of fact raised. The answer and joinder of an issue of fact is a proceeding in the action, and raising such an issue by perjury and deceit is certainly a great abuse.

[*] The learned counsel for the defendant contends that there is no precedent for adjudging a party guilty of a contempt for falsely swearing to an answer in an action. I have been unable to find any decided case exactly in point; but that would be a very lame excuse for refusing to enforce a right or remedy. The court is bound to construe the law, and to make a precedent, at least for its own guidance. It dare not refuse to declare the law, or to enforce its penalties; and if justified by the facts, as the court certainly is in this case, there can be no better time than the present to declare that perjury committed in any proceeding in a civil action is a contempt and must be punished as such.

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[9] The case of Rutherford *v.* Holmes (5 *Hun*, 319; aff'd, 66 *N. Y.* 368), cited by appellant's counsel, relates entirely to proceedings by a justice of the peace to punish for a contempt, and not to a court of record, and Ch. J. FOLGER, delivering the opinion of the court of appeals in that case, says that it is not contended but what at common law a justice of the peace was possessed of the power sought to be exercised in that case, but that the power has been limited and restricted by statute; but the common law power of courts of record has not been taken away by statute.

[10] This court, although of limited jurisdiction, is still a court of record (*Code of Civil Procedure*, § 2, subd. 15).

Our attention is next directed to the inquiry whether the falsely swearing to and service of the answer defeated, impaired, impeded or prejudiced the rights or remedies of the plaintiffs in this action. The last day to serve the answer was March 3, 1885, and if it had not been served on that day, judgment could have been entered by nine o'clock on the morning of March 4, and a transcript filed in Queens county, where defendants owned real estate, within a few hours, and it would have been a lien upon such real estate.

Prior to March 4, 1885, the defendants owned real and personal property at College Point, Queens county, used for carrying on their business as brewers, which property was mortgaged to some extent, but their equity in it was of great value, as it is shown by the price which they received for it. About the first day of March, a corporation was formed for the purpose of carrying on the brewing business theretofore carried on by defendants, and was called the Hirsch & Herman Brewing Company, with a capital of $350,000, and all the brewery property of said defendants was conveyed to such corporation, each of said defendants

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receiving, as a consideration of such conveyance, the sum of $100,000 in stock of said corporation.

The deed of the real estate was recorded in Queens county on March 4, 1885—just one day after the service of the answer, and if said answer had not been served, the judgment might have been entered, and docketed in Queens county, and become a lien upon the real estate before the record of the deed. But if this were not the case the plaintiffs might certainly have had satisfaction of their judgment out of the $200,000 of stock issued to defendants, before they had an opportunity of disposing of it and placing it, if not beyond the reach of creditors, at least in a position to make it difficult to reach.

The defendant Herman disposed of $50,000 of the stock to different creditors as security for various amounts, and the other $50,000 he gave to his wife as security for an alleged debt, which, an examination of the papers clearly shows, had little or no existence in fact.

After the service of the answer, the plaintiffs proceeded with all diligence to press their claim to judgment; they moved to place the cause upon the special calendar for short causes, and the motion was granted by default; and when the cause was reached upon the special calendar, judgment was taken by default, the defendant making no pretense of defending the action after the service of the answer. Execution was returned unsatisfied, and defendant Herman was examined, and it was discovered that the defendants' property had all been disposed of and the proceeds put beyond the reach of ordinary process of the court.

The defendant Hirsch was not served with process, but is alleged to be insolvent, and such allegation is based upon the statement that there are eleven judgments against her unsatisfied of record, which is at least some evidence of insolvency.

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Upon this state of facts it must, I think, be conceded that plaintiff's right to an immediate judg-
[11] ment against defendants, and their remedy for the collection of the same by the ordinary process of the court, were impaired, impeded, prejudiced and defeated by the verification and service of the false answer, and that the court below was justified in its conclusion and adjudication, that the misconduct of defendant had caused an actual loss to the plaintiffs in the amount of the judgment and costs of the proceedings.

[12] The court is restricted, in imposing a fine as an indemnity to the injured party, to the amount of the actual loss which has been produced by the misconduct complained of (*Code Civ. Pro.* § 2284; Sudlow *v.* Knox, 7 *Abb. Pr. N. S.* 411; Dejonge *v.* Brenneman, 23 *Hun*, 332; Clarke *v.* Binninger, 73 *N. Y.* 344; King *v.* Flynn, 37 *Hun*, 329).

But as above stated, the court at special term decided, upon abundant evidence, that the actual loss to plaintiffs by the misconduct of defendant was the amount of the judgment recovered, and the costs and disbursements of supplementary proceedings.

[13] In Sudlow *v.* Knox, Dejonge *v.* Brenneman, and King *v.* Flynn, *supra*, it was held that the evidence failed to show a loss to the full amount of the fines imposed in those cases; in Clarke *v.* Binnin-
[14] ger, *supra*, the imposition of a fine to the full of the plaintiff's claim was sustained, and one of the main points argued by the appellant in that case was, that nothing could be called a loss which was not irremediable and hopeless, and that, as long as it did not appear that the fund in the hands of the receiver, and which he was ordered to pay over, had been wholly wasted, dissipated and destroyed, and that he was utterly unable to pay, however wanton and persistent his refusal to part with such fund, there was

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no loss or injury by such refusal. The court distinctly holds that this position is not tenable.

So, in the case at bar, the fact that the plaintiffs might, by the appointment of a receiver and by [14] creditor's bill and other long and tedious proceedings, collect the whole or part of their judgment, furnishes no just ground for denying their right to indemnify by the more speedy and direct means of a fine or imprisonment.

The defendant claims that he has had no opportunity to be heard, and that his affidavit to the answer is entitled to as much weight as the affidavits impeaching it. This last contention might have some weight, were it not for the fact that the falsity of the answer comes as much from the mouth of the defendant as from any other evidence submitted.

The defendant was given ample opportunity, upon the return of the order to show cause, of contradicting or explaining any of the facts which appeared in evidence against him, but he chose to rest his defense upon the want of the power of the court to punish his misconduct, admitting all the charges against him to be true. The order appealed from must be affirmed, with costs and disbursements.

BROWNE, J., concurred.

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KNOWLES, JUDGMENT CREDITOR, *v.* DE LAZARE, JUDGMENT DEBTOR.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM, DECEMBER, 1885.

§§ 854, 2455.

Subpœna—Form of, in supplementary proceedings.—Costs.

Where a subpœna requiring a witness to appear and testify before a referee in proceedings supplementary to execution was in the usual form of a subpœna in an action and signed by the clerk of the court in which the proceedings were pending,—*Held*, that it was insufficient; that the witness should have been subpœnaed under section 854 of the Code of Civil Procedure, which provides for the issuance of subpœnas in proceedings other than actions in courts of record, by and under the hand of the judge, arbitrator, referee, etc., before whom the proceedings are pending.

Where it appears on a motion to punish a judgment debtor for contempt, in not attending before a referee for further examination pursuant to an adjournment and to punish a witness for contempt in not appearing for examination therein as required by a subpœna, it appeared that there was a misunderstanding and the judgment debtor believed he was not required to appear, and it also appeared that the subpœna requiring the attendance of the witness was insufficient for that purpose, and that the judgment debtor and witness were willing to appear for examination and whatever contempt they were guilty of had been waived,—*Held*, that costs of the motion should not be granted the judgment creditor.

(*Decided December* 14, 1885.)

Motion by judgment creditor to punish the judgment debtor for contempt in failing to attend for further examination before a referee pursuant to an adjournment in proceedings supplementary to execution and also to punish the judgment debtor's mother for failing to attend and submit to an examination as a witness in such proceedings as required by a subpœna served on her.

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Proceedings supplementary to examination were instituted before a referee, and the judgment debtor examined therein, and his deposition duly subscribed by him and sworn to. An adjournment was had to a subsequent day, upon a consent which he stated in an affidavit, he understood and believed was solely for the purpose of examining witnesses, but which in fact, required his attendance on the adjourned day. He did not attend on the return day, and, on due proof of that fact, the motion to punish him for contempt was made.

The motion to punish Mrs. De Lazare, the judgment debtor's mother, for contempt was founded on proof by affidavit that a subpœna directed to her requiring her to attend before the referee and be examined in such proceedings in behalf of the judgment creditor, had been served on her, and that she had failed so to attend. The subpœna was in the usual form of a subpœna in an action in a court of record, tested in the name of the chief justice of this court and signed by the clerk thereof, and service of it was made by delivering a copy to the witness personally, paying her the legal fees for attendance, and exhibiting to her the original.

On the motion, the attorneys for the judgment debtor and said witness, offered to produce them for examination, and the attorney for the judgment creditor waived the contempt and asked for an order for further examination and costs.

Hirsh & Rasquin, for judgment-creditor, and motion.

S. C. Baldwin, for judgment-debtor and witness, opposed.

VAN HOESEN, J.—As the counsel for De Lazare offers to produce the judgment debtor for further

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examination and Mrs. De Lazare for examination as a witness, the only question left is as to whether or not costs should be awarded to the plaintiff. At present, I think that no costs should be given. There appears to have been an honest misunderstanding between De Lazare and the plaintiff's attorney, as to the necessity of De Lazare's attendance at any subsequent time, and De Lazare, under oath, denies an intent to defy the process of the court.

Mrs. De Lazare ought to have been subpœnaed under section 854. Section 295 of the old Code has been repealed,* and People *v.* Dutcher, 3 *Abb. Pr. N. S.* 157, is no longer an authority. Consequently, I will not give any costs against her.

If the plaintiff succeeds in discovering any property belonging to De Lazare, he will not be precluded by the decision of this application from obtaining the usual statutory costs.

WENDELL *v.* LIPSKY.

N. Y. Court of Common Pleas, Special Term, April, 1885

§ 3228.

Answer.—Withdrawing.—Effect on costs.

A defendant has the right at any time to withdraw his answer, the effect of which is that the plaintiff may then enter judgment as if no answer had been put in, but the defendant does not by withdrawing the answer exempt himself from the payment of costs which have up to that time accrued, notwithstanding that such withdrawal is consented to by the plaintiff.

(*Decided April* 17, 1885.)

* Section 295 of the Code of Procedure was in the second chapter of title IX. of that Code, which related to proceedings supplementary

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Motion by defendant for a new taxation of costs.

The defendant served an answer herein, and after the cause had been noticed for trial and a note of issue filed, withdrew it, the attorneys for both parties signing a stipulation reading as follows:

"It is hereby stipulated and agreed that the above answer be and the same is hereby withdrawn and that the plaintiff take judgment herein as for want of an answer."

The plaintiff took judgment accordingly, and taxed a bill of costs which included, besides disbursements, and costs before notice of trial: $15 costs after notice of trial, $10 term fees, and $10 costs on procuring order of arrest. The defendant objected to these three items, and upon their being allowed by the clerk, made this motion.

H. Josephs, for defendant and motion.

William George Oppenheim, for plaintiff, opposed.

DALY, Ch. J.—A defendant, I assume, has the right at any time to withdraw his answer, the effect of which is that the plaintiff has then the right to enter up judgment as if no answer had been put in; but the defendant, by withdrawing the answer, does not exempt himself from the payment of the costs that have up to that time accrued, which in this case would include the costs of the order of arrest, the term fee, and $15 after notice of trial. This would be the result, whether the answer was withdrawn with or without the plaintiff's consent. By consenting, he does not

to execution and read as follows: "§ 205. Witnesses may be required to appear and testify on any proceedings under this chapter, in the same manner as upon the trial of an issue." It was repealed by *Laws of* 1880, ch. 245, § 1, subd. 4 (6).

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waive the costs that have accrued, and I see nothing in the stipulation waiving his right to them. If the defendant desired to free himself from the payment of the costs, he should have so provided in the stipulation.

THE PEOPLE OF THE STATE OF NEW YORK *v.* THE EXCELSIOR GAS LIGHT CO.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, JANUARY, 1886.

§§ 1785, *et seq.*

Action to dissolve corporation.—Pleadings.—Insolvency

In an action under section 1785 of the Code of Civil Procedure, to dissolve a corporation on the grounds that it has remained insolvent for at least one year, and that it has suspended its ordinary and lawful business for at least one year, it is immaterial whether the corporation is a manufacturing corporation or not, inasmuch as the provisions of the Code containing that section refer to all corporations created by or under the laws of this State.

Where, in an action to dissolve a corporation on the ground that it has remained insolvent for at least one year, the complaint alleged that the defendant had been unable to meet its obligations and had failed to pay a judgment therein set forth; that it had not a dollar in its treasury, and was insolvent, and had been so for at least a year past,—*Held*, that an answer alleging payment of the judgment and averring that the corporation had no liabilities to creditors by way of judgments unsatisfied was insufficient; that a corporation may be insolvent against which no judgments have been recovered.

A corporation, like an individual, is insolvent when it cannot pay its debts. Insolvency means a general inability to answer in the course of business the liability existing and capable of being enforced.

(*Decided January* 25, 1886.)

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Motion by plaintiff for judgment upon the pleadings.

LAWRENCE, J.—This action is brought by the attorney general to procure a dissolution of the defendant, The Excelsior Gas Light Company, and to have a receiver of its property, &c., appointed under the provision of article 3, of chapter 15 of the Code of Civil Procedure, sections 1785, 1786, *et seq.*

Two causes of action are stated in the complaint, the first being that the defendant has suspended its ordinary and lawful business for at least one year (see § 1785, subd. 3), and the second, that said corporation has remained insolvent for at least one year.

The answer as to the first cause of action is that the corporation is not authorized to manufacture illuminating gas, not being organized under the act to authorize the formation of gas-light companies, and that it has always been ready—excepting when stayed by injunction—to transact the business for which it was created, and that except when so prevented, it has always transacted its lawful and ordinary business.

As to the second cause of action, it is alleged that a judgment referred to in the complaint was paid by contributions from several stockholders, to be repaid by sales of stock, and that the said company has no liabilities to creditors by way of judgments unsatisfied. It is also submitted in the answer that the defendant is not liable to be proceeded against as a corporation for manufacturing, mining, mechanical or chemical purposes.

Under section 1785 it is not material whether the defendant is a manufacturing, &c., corporation or not, inasmuch as the provisions of the article of the Code containing that section refer to all corporations created by or under the laws of this State.

The first subdivision of section 1785 expressly

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authorizes a judgment dissolving the corporation where it has remained insolvent for at least one year.

In the complaint, in addition to the allegation that the defendant has been unable to meet its obligations, and has failed to pay the judgment which the answer alleges has been paid, it is alleged that the said defendant has not a dollar in its treasury, and is insolvent, and has been so for at least a year past. The answer does not deny this allegation. It alleges payment of the judgment, and avers that the said company has no liability to creditors by way of judgments unsatisfied. A corporation may be insolvent against which no judgments have been recovered (see Ferry *v.* Bank of Central New York, 15 *How. Pr.* 445).

A corporation, like an individual, is insolvent when it is not able to pay its debts. Insolvency means a general inability to answer in the course of business, the liability existing and capable of being enforced (Brouwer *v.* Harbeck, 9 *N. Y.* 594; Marsh *v.* Dunkel, 25 *Hun*, 167).

As there is, therefore, no denial of the general allegation of insolvency contained in the third paragraph of the second cause of action, that allegation must be deemed to be admitted, and it follows that the plaintiffs are entitled to judgment upon the pleadings.

I will, however, give leave to the defendant to amend its answer upon payment of the costs of the action.

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SNIFFEN, RESPONDENT, *v.* PARKER, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, MAY, 1885.

§§ 549, subd. 4, 567, 568.

Order of arrest—Motion to vacate, when ground of arrest and cause of action are identical.

On a motion made upon conflicting affidavits to vacate an order of arrest, where the ground of arrest is identical with the cause of action, an examination pro and con should be made for the purpose of ascertaining whether the order was providently or improvidently granted, and the motion decided upon its merits and not denied on the ground that the matter should be left to be determined by the jury on the trial.

Liddell *v.* Patton (7 *Hun*, 195), followed.

Where an order of arrest was granted on the ground that the defendant was guilty of fraud in contracting or incurring the liability on which the action was predicated,—*Held*, that the plaintiff could not succeed in the action unless he proved the fraud, and that the cause of action and ground of arrest were identical.

Instance of a case in which an order of arrest should have been vacated upon the merits.

(*Decided May* 8, 1885.)

Appeal from order denying motion to vacate order of arrest.

This action was brought to recover $399.51, the contract price of certain advertisements inserted on or about September 11, 1884, by the plaintiff in sundry newspapers, for the defendant. An order for the arrest of the defendant was granted upon an affidavit made by the plaintiff, that the defendant was guilty of fraud in contracting and incurring the liability, in that to induce the plaintiff to insert the advertisements he had represented that he owned household furniture

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worth over $800, which was not subject to any mortgage or incumbrance; that he was a partner in the printing business with his uncle in New Jersey, and could have orders for printing executed for plaintiff and credited on the account, that he owned over $400 worth of jewelry as stock, and owned office furniture and a safe on which there was no mortgage or incumbrance of any kind, and that he did not owe any man a single dollar; that credit was given upon faith in these statements, and that they were "entirely false and untrue;" that he was absolutely insolvent; and there were unsatisfied judgments against him to a large amount and he had been examined in supplementary proceedings without discovering any property; that he was not a partner in the printing business with his uncle in New Jersey; and, upon information and belief, that he did not own the household furniture, stock of jewelry, office furniture, fixtures and safe which he stated and represented to plaintiff that he owned.

The defendant, who was arrested under the order and held to bail, moved to vacate it, upon his own affidavits alleging that he could have orders for printing executed for plaintiff as he had stated, and that he owned the stock of jewelry, office furniture and fixture, and one-quarter of the safe, and denying that he made any of the statements alleged to have been made by him, and also an affidavit by a clerk of the plaintiff that the plaintiff had done business with the defendant for a number of years, and had every opportunity to acquaint himself with defendant's circumstances.

The motion was denied at special term, the court (DONOHUE, J.) filing the following memorandum:

"Whereas, in this case the cause of arrest and cause of action are the same, I think the matter should be left to the jury. As to the defects in the undertaking, none being stated, and no copy being

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annexed to defendant's papers, they connot be considered."

Wesley S. Yard, for defendant-appellant.

Cited, in support of contention that the allegations in plaintiff's affidavits of the falsity of defendant's statements were not sufficient, Draper *v.* Beer, 17 *Abb. Pr.* 163; Cummings *v.* Woolley, 16 *Id.* 297; Thrope *v.* Waddington, 3 *Daly*, 275.

Morris A. Tyng, for plaintiff-respondent.

Where the ground of arrest is identical with the cause of action, and the facts on which the order was granted must, therefore, be proved on the trial, the court will not, on motion, set aside the order on conflicting affidavits, unless on the trial on the same evidence it would be justified in ordering a non suit, or directing a verdict for the defendant. Hoy *v.* Duncan, 38 *N. Y. Super.* (6 *J. & S.*) 555; Peck *v.* Lombard, 22 *Hun*, 63; Ansonia Clock Co. *v.* Metcalf, 13 *N. Y. Weekly Dig.* 143; Myers *v.* Caffe, 4 *N. Y. Monthly Law Bull.* 2; Tallman *v.* Whitney, 5 *Daly*, 505. The allegations in the plaintiff's affidavit, if proved on the trial, will be sufficient to sustain a verdict that "the defendant was guilty of fraud in contracting or incurring the liability." Morris *v.* Talcott, 29 *Hun*, 426.

BRADY, J.—The order of arrest was granted on the ground that the defendant was guilty of a fraud in contracting or incurring the liability of which the action was predicate, and the plaintiff cannot succeed unless he can prove the fraud (*Code of Civil Procedure*, § 549, subd. 4). The ground of arrest is therefore identical with the cause of action. In other words, the right of arrest depends upon the nature of the action, and it has been held in many cases that when the ground upon which the defendant is arrested is iden-

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tical with the cause of action, that is to say, is a part of it, and must be established to enable the plaintiff to recover upon the trial, the order of arrest will not be set aside upon motion on conflicting affidavits, unless, indeed, the evidence is of such a character as would require the justice presiding at the trial to direct a verdict for the defendant. This is conceded to be the rule by the learned counsel for the respondent, and is indeed established by a number of cases to which he refers. But this court, in the case of Liddell *v.* Paton (7 *Hun*, 195), held, that even in a case where the ground of arrest is identical with the cause of action, the administration of justice required an examination pro and con for the purpose of ascertaining whether the order was providently or improvidently granted, inasmuch as the result of that action involved the personal liberty of the citizen.

The learned judge in the court below, following the rule established by the decisions mentioned, thought that the matter should be left to the jury—that is to say, the proof of the allegations asseverating the fraud should be left for the determination of the jury. He did not, therefore, decide the case upon its merits. It becomes necessary, in view of the decision of this department already mentioned to dispose of the case upon its merits, and in the exercise of our discretion we might remit it to the special term for that purpose. But it is not necessary, the case having been investigated thoroughly upon the record. The impression left upon a perusal of the affidavits submitted is that the charge of false representations was an afterthought resorted to for the purpose of enforcing payment.

Some statements in the defendant's responsive affidavit are not met in rebuttal, and they are such in the judgment of this court as to require some explanation. The plaintiff, it may be said, charges in some respects

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on information and belief, the sources of the information not being given. The defendant, in addition to his own affidavit, presents one made by a person who was in the employment of the plaintiff, and it is quite apparent that the business dealings between the parties had been such and had continued for such a period as to enable the plaintiff to become familiar with the responsibility and character of the defendant. But if not familiar he certainly ought, through them, to have possessed himself of sufficient knowledge to have enabled him to determine without representations whether the defendant was worthy of credit or not.

In the numeous investigations which this court is obliged to make of charges of false representations in contracting debts, not only upon applications to discharge orders of arrest, but to discharge attachments, it seems to be perfectly justifiable to say that in many instances the resort to the provisional remedy of arrest and of attachment is the last effort of the dishonest creditor.

It is not intended to make any personal application of this observation herein, but to intimate that the remedies by order of arrest and attachment are very much abused, and in the hope that more scrutiny will be observed before presenting the applications for them.

For these reasons we think the order of arrest should have been vacated and the motion in the court below therefore granted.

Order reversed, with $20 costs and disbursements.

DAVIS, P. J., concurred. DANIELS, J., concurred in result.

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KENNEY v. FIRST NATIONAL BANK OF PITTSBURGH.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, NOVEMBER, 1885.

§ 3251, subd. 3.

Special verdict.—What is not such an application for judgment on, as will entitle successful party to costs thereof.

Where, immediately upon the rendition of a special verdict judgment was ordered by the trial judge,—*Held*, that there was not such "an application for judgment upon a special verdict" as would entitle the successful party to costs under subdivision 3 of section 3251 of the Code of Civil Procedure, which provides for the amount of costs upon an application for judgment upon a special verdict.

(*Decided November* 30, 1885.)

Motion for new taxation of costs.

The action was brought to recover $3,708.41 and interest, on a certain draft or bill of exchange alleged to have been drawn by the defendant, The First National Bank of Pittsburgh, on the U. S. National Bank of New York, to the order of one Mathew Kenney, now deceased, and by him transferred to plaintiff, which draft the drawee had refused to accept and pay. By direction of the court, one Peter Duffy, who claimed to have been appointed administrator, etc., of said Mathew Kenney by the probate court of Perry county, Ohio, was made a party defendant, and the fact that he claimed to be such administrator set forth in the complaint, together with an allegation that he was not entitled to administration; that the plaintiff had no knowledge or information sufficient to form a belief as to whether letters of administration had been

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granted him, and that the plaintiff had no claim against him as such alleged administrator.

The defendant Duffy answered, setting forth the death of Mathew Kenney and the granting of letters of administration on his estate to the said defendant by the probate court of Perry county, Ohio, and of ancillary letters of administration by the surrogate of New York county, and alleging the making and delivery of the draft in suit to Mathew Kenney; that its payment had been countermanded by the maker thereof, and therefore it had not been presented on behalf of said Mathew Kenney; that the plaintiff had obtained possession of the draft wrongfully, and that the title thereto and right to the possession thereof was in the defendant Duffy as administrator, &c.; and asked judgment against the plaintiff for the delivery of the note and against the bank for the amount thereof.

The answer of the First National Bank of Pittsburgh admitted the making of the draft and its nonpayment; alleged that it was ignorant as to who was the owner thereof, and asked that that fact be determined and adjudged, so that it might, on paying the judgment, "be forever free from all further risk and liability in respect to said bill of exchange."

The action was tried at circuit, and the court submitted the following question, to the jury,—to the first, second and third of which they answered "yes," and to the fourth "no,"—

"First. Is the signature of 'Mathew Kenney' indorsed upon the bill of exchange in suit, marked exhibit 'A,' in the handwriting of Mathew Kenney, the payee of said bill?

"Second. Did the said payee, Mathew Kenney, ever indorse said bill of exchange?

"Third. Has the plaintiff William Kenney any right, title or interest in the said bill of exchange?

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"Fourth. Is the defendant Peter Duffy, as administrator of the goods, chattels and credits which were of said Mathew Kenney, deceased, entitled to the possession of said bill of exchange, and to the amount due thereon?"

The court, immediately upon the rendition of this verdict, directed judgment against the defendant, the First National Bank of Pittsburgh, in favor of the plaintiff. The plaintiff presented a bill of costs to the clerk for adjustment, upon notice, in which was included costs, on "application for judgment on special verdict before argument, $20; for argument, $40. Upon objection bring made thereto, the clerk disallowed these items, and the plaintiff thereupon made this motion.

Marsh, Wilson & Wallis, for plaintiff and motion.

Willard P. Shaw, for defendant, First National Bank of Pittsburgh, opposed.

Ewing & Southard, for defendant, Duffy.

ANDREWS, J.—As judgment was entered by direction of the trial judge immediately upon the rendition of the verdict, I do not think that there was such "an application for judgment upon a special verdict," as is referred to in subdivision 3 of section 3251 of the Code. The items in dispute were therefore properly disallowed.

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CLEGG v. THE CHICAGO NEWSPAPER UNION, IMPLEADED, ETC.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, JANUARY, 1885.

§ 1775.

Corporation—Allegations in complaint in action by or against, as to incorporation.

Were a complaint alleged that certain defendants were foreign corporations, but did not set forth the State, country or government, by or under whose laws they were created,—*Held*, that a demurrer on the ground that it did not contain facts sufficient to constitute a cause of action, interposed by one of such defendants, should be sustained, that the objection was one that could be taken by demurrer.

Baker v. Star Print. & Pub. Co. (3 *N. Y. Monthly Law Bul.* 29), followed. Fox v. Erie Preserving Co. (93 *N. Y.* 57), Irving Nat'l. Bank v. Corbett, (10 *Abb. N. C.* 86), distinguished.

(*Decided January* 18, 1886.)

Demurrer to complaint by the defendant, The Chicago Newspaper Union, on the ground that it does not contain facts sufficient to constitute a cause of action.

The opinion states sufficient facts.

Philip Carpenter, for defendant and demurrer.

William Ford Upson, for plaintiff, opposed.

LAWRENCE, J.—Section 1775 of the Code provides that in an action by or against a corporation the complaint must aver that the plaintiff or the defendant, as

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the case may be, is a corporation; must state whether it is a domestic corporation, and if the latter, the State, country or government, by or under whose laws it was created. In this case it is averred that the plaintiff is informed and believes that the said last named defendants respectively, except the said defendants, the New York Newspaper Union, were and are foreign corporations and companies or associations, &c. It is not stated under the laws of what State or country or government, the said defendant was created. I am of the opinion that the demurrer is well taken. The language of the Code is imperative that the complaint must state, &c. Confessedly, the complaint does not contain certain facts which the Code says must be stated. The precise point involved in this case was decided by J. F. DALY, J., in Baker *v.* Star Printing and Publishing Company (3 *N. Y. Monthly Bul.* 29).

The case of Fox *v.* Erie Preserving Co. (93 *N. Y.* 54), is not in point, for the reason that the corporate character of the defendant had nothing to do with the cause of action, and the section of the Code invoked in this case was not the subject of consideration there. In the case of Irving Nat. Bank *v.* Corbett (10 *Abb. N. C.* 86), the demurrer was held not to be good, because it did not appear upon the face of the complaint, that the plaintiff was a corporation; and the learned justice who decided that case expressly states in his opinion that it could not be assumed in support of the demurrer that the plaintiff was a corporation, and that if such was the fact, the objection should have been taken by answer.

In this case, as we have already seen, it does appear that the Chicago Newspaper Union is a foreign corporation, and the objection that the complaint does not state the other facts required to be stated by section 1775 of the Code, can therefore, be taken by demurrer.

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There must be judgment for the defendant upon the demurrer, with leave to the plaintiff to amend upon payment of costs.

KRANZ, APPELLANT, *v.* DUN, ET AL., RESPONDENTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, FEBRUARY, 1884.

§ 531.

Bill of particulars—When properly ordered in action against mercantile agency for libel.

Where, in an action by a merchant against a firm conducting a mercantile agency, to recover damages for the injury to the plaintiff's "reputation, good name and credit in his business," caused by the alleged maliciousness, illegal and voluntary publication by the defendants of certain false, defamatory and libelous statements concerning his business character and financial standing, it appeared from an affidavit signed by all the defendants, that they had, beside their principal office, at least ninety branches or sub-offices in as many different cities of the United States and Canada; that it was their business to procure and preserve for their subscribers "and, when needed for the purpose of assisting them to act with proper judgment and discretion in their business transactions, to communicate to such subscribers, in confidence and for their sole and exclusive use, information as to the property and personal and business character, credit, conduct, and worthiness of persons transacting business in the United States or in Canada. . . . . that any statement which may at any time have been published by the defendants concerning the plaintiff was published in the course of the defendants' said business by the defendants' clerks and to the defendants' subscribers in the manner above described, and not otherwise, and that if any statement concerning the plaintiff has at any time been made to any person not a subscriber of the defendants, it was made in fraud of the defendants and in violation of their express instruc-

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tions to their clerks and agents; that of the clerks employed in defendants' business there are not less than four hundred who have access to the defendants' records concerning the plaintiff; and that defendants after making diligent inquiry therefor have no knowledge or information of any publication of any statement concerning the plaintiff made by the defendants or by any of their clerks or agent to any person not a subscriber of the defendants,—*Held*, that an order requiring the plaintiff to serve "upon the defendants' attorneys a bill of particulars specifying every person and firm to whom he intends to prove, the alleged libelous statement was published and giving the name of the towns or cities in which such persons respectfully reside, or have a place of business," should be affirmed.

(*Decided February* 1, 1884.)

Appeal by plaintiff from an order requiring him to serve a bill of particulars.

The action was brought to recover $30,000 damages for the alleged publication of a libel, and the complaint alleged that the plaintiff was, at the times mentioned in the complaint, and for many years prior thereto, engaged in a mercantile business as a dealer in gents furnishing goods in New Orleans, La., and had an established credit and a reputation for honesty and integrity; that the defendants were copartners; that the plaintiff had been injured by the alleged libelous publication in his reputation, good name and credit to his damage $30,000, and set forth the publication complained of as follows:

"That on or about October 20, 1882, these plaintiffs maliciously, illegally and voluntarily made and caused to be published and distributed among the business community throughout the United States, and especially the firms of Alfred Benjamin & Company, Mills & Gibbs, Berliner & Strauss and F. R. Arnold & Company, all of the city of New York, and others with whom this plaintiff had been dealing, and with whom he had a good credit and was endeavoring

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to increase the same by his honest dealing in business a certain false, defamatory and libelous statement concerning this plaintiff in words and figures following, to wit: . . ." [Here followed the alleged libelous publication being a statement concerning the plaintiff's business character and credit.] The defendants moved for a bill of particulars upon such complaint, and an affidavit in which they all joined stating that "they conducted the business known as the Mercantile Agency; that the principal office of the said business was in the city of New York, and there were then no less than ninety branches or sub-offices of the business in as many different cities of the United States and Canada; that it is the object of the said Mercantile Agency to procure and preserve for its subscribers, who are a large number of merchants and dealers in the said cities, and, when needed for the purpose of assisting them to act with proper judgment and discretion in their business transactions, to communicate to such subscribers, in confidence, and for their sole and exclusive use, information as to the property and personal and business character, credit and conduct and trustworthiness of persons transacting business in the United States or Canada; that in the course of such business the defendants have procured and preserved, and now have on record in their books such information as to upwards of one million of such persons; that the immense extent of the defendants' business makes it impossible for them in person to procure and record such information or to communicate it to their subscribers, but they are obliged in such procuring, recording and communicating, to act principally through their agents and clerks; that such information, if it is more than a mere estimate of the claims to business credit of the persons to whom it relates, or if it contains a statement of fact, is, in the usual course of business, communicated to said

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subscribers only upon their special request therefor, and by the reading of the same to them from the defendants' books by the defendants' clerks, or by the delivery of copies thereof to said subscribers by said clerks; that any statement which may at any time have been published by the defendants concerning the plaintiff was published in the course of defendants' said business by the defendants' clerks and according to deponents' information and belief to the defendants subscribers in the manner above described and not otherwise, and that if any statement concerning the plaintiff has at any time been made by any clerk or agent of the defendants to any person not a subscriber of the defendants, it was made in fraud of the defendants and in violation of their express instructions to their clerks and agents; that of the clerks employed in defendants' business there are not less than four hundred who have access to the defendants' records concerning the plaintiff; that defendants after making diligent inquiry therefor, have no knowledge or information of any publication of any statement concerning the plaintiff, made by the defendants or by any of their clerks or agents to any person not a subscriber of the defendants."

The court, at special term granted the motion and directed the plaintiff to serve "upon the defendants' attorneys a bill of particulars specifying every person and firm to whom he intends to prove the alleged libelous statement was published, and giving the names of the towns or cities in which such persons respectively reside, or have a place of business," and this appeal was taken therefrom by the plaintiff.

A. S. Warner, for plaintiff-appellant.

This order affects a substantial right and is therefore appealable. Hanover Fire Ins. Co. *v.* Tomlinson, 58 *N. Y.* 215; Livermore *v.* Bainbridge, 56 *Id.* 72; Mat-

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ter of Duff, 10 *Abb. N. S.* 416. Though the court has undoubtedly power to order a bill of particulars, yet it should be rarely exercised in a libel suit, and only in its wisest discretion, and its exercise in this case was not in the line of wisdom. Orvis *v.* Dana, 1 *Abb. N. C.* 268; Higgenbotham *v.* Green, 25 *Hun*, 214; Stevens *v.* Webb, 4 *N. Y. Civ. Pro.* 64. The office of a bill of particulars is not to disclose to the opposite party, the evidence upon which the party from whom it is demanded expects to rely, nor to furnish evidence for the other party. Strong *v.* Strong, 1 *Abb. Pr. N. S.* 238; Orvis *v.* Dana, *supra;* Dooley *v.* Royal Bk. Pow. Co., 1 *N. Y. Monthly Law Bull.* 18; Stevens *v.* Webb, *supra.* The inconvenience or trouble to which the defendants may be put in proving their case, is no reason why plaintiff should be limited in his evidence. Stevens *v.* Webb, *supra.* It is not the office of a bill of particulars to enable defendant to impeach or defend the claims, asserted by plaintiff's complaint, nor to furnish evidence, but to prevent surprise on the trial. There is no claim on the part of the defendants, that surprise will arise to them in this case. Drake *v.* Thayer, 5 *Robt.* 694; Fullerton *v.* Gaylord, 7 *Id.* 551. Defendant must show absolute necessity for such bill. Wills *v.* Bailey, 19 *Johns.* 268. The publication being voluntary, it matters not whether made to subscribers or not. Sunderlin *v.* Bradstreet, 46 *N. Y.* 188.

F. L. Minton (*Douglass & Minton*, attorneys), for the defendants-respondents.

A publication, made in the course of the defendants' business to their subscribers in good faith and without actual malice, is privileged. Ormsby *v.* Douglass, 37 *N. Y.* 477. The defendants cannot be prepared to prove their defense of privilege, unless they are, before the trial, informed of the names of the persons to whom the publication was made. Under the com-

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plaint as it stands the plaintiff may introduce evidence of a publication to any member of the business community any where in the United States. In a proceeding for discovery in slander, before trial, the court of exchequer, *in banc*, allowed the defendant to interrogate the plaintiff as to the names of the persons to whom the slander was uttered, upon the ground that as to some persons, the words might be privileged, and the defendant ought to have an opportunity of preparing the evidence upon the question of privilege. Lewis *v.* Walford, *N. Y. Daily Register*, April 4, 1878. The defendants should have an opportunity to seek for and to produce evidence to disprove the alleged publication. They will have no such opportunity if they are compelled to go to trial with no information of the time or place of the publication, or of the persons to whom the plaintiff will attempt to prove it was made. The power to order bills of particulars is given to the court, as is said by FOLGER, Ch. J., in Dwight *v.* Germania Ins Co. (84 *N. Y.* 502), "to reach exact justice between the parties, by learning just what is the truth, and to learn what is the truth by giving to each party all reasonable opportunity to produce his own proofs and to meet and sift those of his adversary." If the charge were of a publication, by them in person they might be prepared with their personal testimony. But even in such cases they would be entitled to the particulars they have sought. 21 *Hun*, 457. Much more is it their right, when the plaintiff has the power to select any one of four hundred of the defendants' clerks, and to attempt to prove a publication by that one. The case of Stiebling *v.* Lockhaus, 21 *Hun*, 457, is directly in point. This case was followed in Gardinier *v.* Knox, 27 *Hun*, 500.

The court at general term (DAVIS, P. J., BRADY and DANIELS, JJ.), affirmed the order of the special term,

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with $10 costs and disbursements to defendants, on the argument, without opinion.

SMITH, RESPONDENT, *v.* PFISTER, ET AL., APPELLANTS.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM, JANUARY, 1886.

§ 542.

Amended pleading.—Motion to strike out, on the ground that it was interposed for delay, when denied.—When right to move lost by obtaining extension of time to answer or demur.

Where, in an action on a promissory note against the maker, and an indorser, the complaint set forth a cause of action in the usual form, and in addition alleged that the note was for goods, wares and merchandise sold and delivered to the maker thereof by the plaintiff, and the indorser indorsed it for the purpose of procuring a credit for the maker with the plaintiff, and, upon a demand being made for a bill of particulars of the goods, wares and merchandise sold and delivered to the maker, an amended complaint was served within the twenty days allowed therefor, setting up the same cause of action but omitting the allegations stating the consideration of the note and indorsement, and it did not appear that the amendment was made for the purpose of delay, or that the defendant would lose the benefit of a term,—*Held*, that a motion, that such amended answer be set aside and held for naught was properly denied; the amendment having evidently been made for the purpose of avoiding the service of a bill of particulars.

Where a defendant procured two extensions of time to answer or demur to an amended complaint without reserving the right to move to set it aside,—*Held*, that he had thereby waived his right to do so, and a motion that the amended complaint be set aside and held for naught, made after obtaining one of such extensions should be therefore denied; that the procuring of extension of time to

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answer or demur implied that it was sufficient to require an answer or demurrer.

(*Decided January* 23, 1886.)

Appeal by defendants from an order of the Erie county special term, denying their motion that the plaintiff's amended complaint be set aside and held for naught.

The action was brought against the maker and indorser of a promissory note to recover the amount thereof. Other facts are stated in the opinion.

Frederick R. March, for defendants-appellants.

An amended pleading must be essentially different from the original; it will not answer that it is, in form and phraseology, different from the one first served. Snyder *v.* White, 6 *How. Pr.* 321; Hitchcock *v.* Baer, 17 *Hun*, 604. It has been held that leaving out a demurrer in an answer is not an amended pleading. Howard *v.* Mich. S. R. R. Co., 5 *How Pr.* 206. It has, also, been held that part of a pleading being stricken out on the ground of irrelevancy is not an amendment. Ross *v.* Dinsmore, 12 *Abb. Pr.* 4. Repeating a pleading in a different form is not allowed as an amended pleading. Evangelical Luth. Ch. *v.* Fingas, 11 *N. Y. Weekly Dig.* 460; Strong *v.* Dwight, 11 *Abb. Pr. N. S.* 319. All the issuable facts in the amended complaint were contained in the original complaint; it was in effect serving the same complaint over again. The plaintiff's right is not confined to amendment of such matter as was defectively stated in the original complaint. Brown *v.* Leigh, 12 *Abb. Pr. N. S.* 193. The amended complaint sets up no new matter, nor cause of action; it states nothing that could not have been proven on the trial of the cause under the first complaint, it is obvious that the amendment was made to avoid the service of a bill of particulars. Plaintiff

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may amend his complaint by setting forth a new cause of action. Brown *v.* Leigh, 49 *N. Y.* 78.

Plumley & Kingston, for plaintiff-respondent.

Section 542 of the Code of Civil Procedure permits a pleading, . . to be once amended of course without costs within twenty days after the service thereof, or at any time before the period of answering it expires. The only restriction imposed by the Code is that the amendment be not for the purpose of delay. . . . The right to amend of course is absolute, subject to the power of the court to strike out for cause shown. Cooper *v.* Jones, 4 *Sandf.* 699; Frank *v.* Bush, 2 *N. Y. Civ. Pro.* 250; Clifton *v.* Brown, 2 *Id.* 44; Brown *v.* Leigh, 49 *N. Y.* 78; Robertson *v.* Brown, 1 *Abb. N. C.* 477; Thompson *v.* Minford, 11 *How. Pr.* 273; McQueen *v.* Babcock, 22 *Id.* 229. By accepting and retaining the amended complaint, without objection, and without notice that it would be disregarded, defendant waived any defect in the pleadings. Over a month elapsed after the service of the amended complaint before defendant served his notice of motion to set it aside, and, in the meantime, he had obtained from the court an order extending his time to answer or demur to it. Under such circumstances the motion was properly denied. Bowman *v.* Sheldon, 5 *Sandf.* 657, 662; Hollister *v.* Livingston, 9 *How. Pr.* 140.

HAIGHT, J.—The original complaint declared upon a promissory note in the usual form, and in addition contained the following: "That said note was made by the defendant Joseph C. Pfister, and indorsed by the defendant John G. Crocoll for the purpose of paying for goods, wares and merchandise sold and delivered by this plaintiff to the defendant Pfister, on the credit of such indorsement, and that Crocoll indorsed the same, for the purpose of procuring for the said

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maker a credit with the plaintiff, knowing that it would be so applied, and that said note was so passed and so indorsed by the defendant with his privity to the plaintiff in payment for such goods and merchandise thus sold and delivered."

The defendants demanded of the plaintiff a verified bill of particulars of the goods, wares and merchandise sold and delivered by the plaintiff to the defendant Pfister, upon the credit of the indorsement of the note in suit as stated and set forth in the complaint. Thereafter, and within twenty days from the date of the service of the complaint, the plaintiff served an amended complaint, setting up the same cause of action as that set forth in the original complaint, leaving out, however, the allegations thereof which stated the consideration for the note and indorsements.

Subsequently the defendants procured an order from one of the justices of this court, extending his time to answer or demur to the amended complaint, twenty days—which order was served upon the plaintiff's attorneys; and subsequently, still, the defendants' attorney procured a stipulation from the plaintiff's attorneys further extending their time to answer the complaint.*

After procuring the order extending the time to answer the amended complaint, the defendants moved at special term for an order that the amended complaint be set aside and held for naught for the reason that it was not sufficient as an amended complaint. This motion was denied, and from the order entered thereon appeal was taken to this court.

Section 542 of the Code provides that: "Within twenty days after a pleading, or the answer or

* This last extension was granted by plaintiff's attorneys, after the notice of motion to strike out the amended complaint was served.

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demurrer thereto, is served, or at any time before the period for answering it expires, the pleading may be once amended by the party, of course, without costs, and without prejudice to the proceedings already had. But if it is made to appear to the court, that the pleading was amended for the purpose of delay, and that the adverse party will thereby lose the benefit of a term, for which the cause is or may be noticed, the amended pleading may be stricken out, or the pleading may be restored to it original form, and such terms imposed as the court deems just." In the case under consideration it was not made to appear that the pleading was amended for the purpose of delay or that the adverse party would lose the benefit of a term by reason of such amendment.

The evident purpose of the amendment was, to get rid of serving a bill of particulars as to the goods, wares and merchandise sold and delivered by the plaintiff to the defendant Pfister, which it was alleged was the consideration for the note. It was not necessary for the plaintiff in stating his cause of action to state the consideration upon which the note was given; having stated it, the defendants had the right to answer it; to avoid this, the plaintiff saw fit within the time given him by the Code to serve an amended complaint omitting this allegation. We are of the opinion that this is permissible under the provisions of the section quoted.

Again, the defendants had waived their right to make the motion by procuring an order extending their time to answer the amended complaint, or demur, without reserving the right to move to set it aside. The procuring of extention of time implies that the complaint is sufficient to require an answer or demurrer (See Brooks v. Hanchett, 21 *N. Y. Weekly Dig.* 267,* and authorities there cited).

* S. C., 36 *Hun*, 70. See also Bowman v. Sheldon, 5 *Sandf.* 657;

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The order should be affirmed, with $10 costs and disbursements.

SMITH, P. J., BARKER and BRADLEY, JJ., concurred.

ESTATE OF JOHN J. STUDWELL, DECEASED.

MEAD, APPELLANT, *v.* YOUNG, RESPONDENT.

SUPREME COURT, SECOND DEPARTMENT, KINGS COUNTY, SPECIAL TERM, JANUARY, 1886.

§ 1315.

Surrogate's practice.—When surrogate not deemed to have taken judicial notice of paper filed in his office.—Return on appeal.

Where, on the offering of a will for probate, a paper containing an objection to the qualification of one "Y.," nominated in the will for executor, was filed by one "M.," and the hearing adjourned, and thereafter, before the adjourned day, another paper was filed in the surrogate's office by "M.," containing some specifications of said first objection, and a further objection, but no notice of such filing was given to "Y." or his attorney, and the surrogate, without having seen or heard of this last mentioned paper, admitted the will to probate, and issued letters testamentary thereon to "Y.," and for that reason, in the settlement of the case on appeal from his order, granting such letters, struck said papers out of the case,—*Held*, that an application for a peremptory mandamus to compel the clerk of the surrogate's court to certify and transmit to the supreme court said paper should be denied; that the surrogate cannot be deemed, as a matter of law, to have taken judicial notice of its contents.*

(*Decided January* 25, 1886.)

Garrison *v.* Carr, 8 *Abb. Pr. N. S.* 266; S. C., 34 *How. Pr.* 187; Marry *v.* James, 34 *How. Pr.* 238, cited in Brooks *v.* Hanchett, and Miller *v.* Vose, 4 *Sandf.* 660; Isham *v.* Williamson, 7 *N. Y. Leg. Obs.* 340.

* The order entered on the decision here reported, was affirmed,

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Motion by the appellant for a peremptory mandamus, to compel the clerk of the surrogate's court of Kings county to certify and return to the county clerk of Kings county, a copy of a certain paper on file in his office.

On January 5, 1885, when the will of John J. Studwell, deceased, was offered for probate, the appellant, Elizabeth B. Mead, filed in the surrogate's office of Kings county, under section 2636 of the Code of Civil Procedure, a certain paper containing a general objection to the qualifying of the respondent, Charles T. Young, as one of the executors of said will, on the ground that his circumstances were such as not to afford adequate security to the creditors or persons interested in the estate for the due administration thereof, but in said paper did not state any facts, or make any declaration of an intention to make it more specific. The proceedings for the probate of said will were thereupon adjourned. On January 13, the respondent had a number of opposing affidavits verified. On January 14, the appellant filed in the surrogate's office another paper, objecting to the qualifying of the respondent as executor of said will, which paper contained some specifications of said first objection, and certain facts in relation thereto, and a further objection: "want of understanding in business affairs."

No notice of the filing of said last paper was given to the respondent or his attorney, and said paper was never read nor presented to the surrogate.

On January 19, 1885, to which date the matter had been adjourned, after the opposing affidavits had been

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on appeal, by the general term of supreme court in the second department (BARNARD, P. J., DYKMAN and PRATT, JJ.), without opinion, on February 9, 1886.

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read, the will was admitted to probate, and the respondent was allowed to qualify as executor thereof without any security being required, and an order to that effect was signed by the late Surrogate BERGEN, and entered.

The appellant, having appealed from that order to the general term, presented a proposed case containing said specific objections, filed on January 14, 1885, and Surrogate BERGEN, on settlement, struck said objections from the case, on the ground that they had never been before him, he never having seen them, or even heard of them, until the case was presented for settlement.

On June 2, 1885, on a motion for a re-settlement, Surrogate BERGEN again refused to insert them in the case.

On December 28, 1885, the Surrogate BERGEN'S successor in office, the Hon. ABRAHAM LOTT, on a second motion for re-settlement made before him, also refused to insert them in the case.

The appellant claimed that said paper, being actually on file, it was therefore before the surrogate, and that his order was based on said paper.

Josiah T. Marean, for appellant and motion.

Judah B. Voorhies, clerk of surrogate's court, in person, opposed.

Joseph Aspinall, for respondent, opposed.

BARTLETT, J.—This is an application for a peremptory mandamus to compel the clerk of the Kings county surrogate's court to certify and transmit to this court a copy of a certain paper, upon which the appellant claims that the surrogate based the order which he has appealed from.

The clerk has declined to certify this paper, on

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the ground that it was not in fact considered by the surrogate in making that order.

In this view the clerk is sustained by the express statement of the surrogate himself (the late JACOB I. BERGEN, in a decision filed May 27, 1885, wherein he said that this paper was never brought to his attention until the case was presented for settlement.

The law provides for the transmission to the appellate court of certified copies of the notice of appeal of the order, and of the papers on which the order was founded (*Code of Civil Pro.* § 1315).

I cannot hold that the surrogate actually based the order appealed from upon a paper, the existence of which appears to have been wholly unknown to him at the time he made the determination sought to be reviewed.

Nor do I think the surrogate must be deemed as matter of law to have taken judicial notice of the contents of a paper filed with the clerk, under the circumstances shown in this case, where no information, even of the fact of filing, was communicated to the surrogate.

Application denied, with costs.

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FINKEMAUR *v.* DEMPSEY.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM, JANUARY, 1886.

§§ 549, 1487.

Execution against the person.—When issued for costs, in action to set aside bond and mortgage.

Where, in an action for the surrender and cancellation of a bond and mortgage upon real estate upon the ground that the defendant procured them from the plaintiff by fraud and false pretenses, the plaintiff succeeded, and the defendant canceled the bond and mortgage as required by the judgment, after the return unsatisfied of an execution against the property for the costs awarded the plaintiff by such judgment, an execution may be issued therefor against the person of the defendant, although an order of arrest was not granted in the action. The gravamen of the action was fraud, and the case was within subdivision 2 of section 549 of the Code of Civil Procedure.

(*Decided January* 4, 1886.)

Motion made by defendant at special term to set aside an execution herein against the defendant's person.

The action was brought to set aside and procure the cancellation of a bond and mortgage upon certain real estate for $1,500, executed by plaintiff to defendant. The complaint charged that the defendant procured the bond and mortgage from the plaintiff by fraud and false pretenses, and detailed specifically the acts of the defendant constituting such fraud and false pretenses.

Judgment was rendered in favor of the plaintiff, after trial at special term, which was entered June 24,

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1878, adjudging that the bond and mortgage had been obtained from plaintiff by fraud, and were, therefore, void; that the defendant cancel the same, and surrender them to the plaintiff, and that the plaintiff recover from the defendant the costs of the action. The bond and mortgage were duly surrendered and canceled by defendant as the judgment directed.

On June 24, 1878, an execution was issued against the defendant's property for said costs, which was returned *nulla bona*.

In December, 1885, the plaintiff issued an execution for the collection of said costs, only, against the defendant's person, which is the execution sought to be set aside on this motion.

No order of arrest was ever granted or executed in the action.

Louis P. Levy, , for defendant and motion.

Charles M. Hall, for plaintiff, opposed.

VAN HOESEN, J.—The execution against the person of the defendant was properly issued. I think that the ground upon which the execution is to be supported, was correctly stated by Judge DONOHUE in Smith *v.* Duffy.* The right to arrest the defendant

* Smith *v.* Duffy was an action to set aside and annul a conveyance of real property on the ground that it was fraudulently obtained from the plaintiff by the defendant. The plaintiff recovered judgment adjudging that the conveyance was fraudulently obtained, directing a reconveyance to her, and for the costs of the action. The reconveyance was duly made, but the costs were not paid. After an execution against the property for such costs had been duly issued and returned unsatisfied, an execution therefor was issued against the defendant's person, although no order of arrest had been granted in the action. The defendant moved at the New York county special term to set aside the execution against his person, and the motion

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depends upon the nature of the action (subd. 1, § 1487). The gravamen of this action was fraud; and though the relief sought was of an equitable character, the court could and would have awarded damages to the plaintiff in case the bond and mortgage had been placed where the court could not compel the cancellation of them. This case may, therefore, well be held to be within the second subdivision of section 549 of the Code.

Motion denied.

STRINGHAM, RESPONDENT, *v.* STEWART, APPELLANT.

SUPREME COURT, SECOND DEPARTMENT, SPECIAL TERM, FEBRUARY, 1886.

§§ 1327, 1352.

Undertaking on appeal.—When attorney and counselor at law may act as surety on.

An attorney who has abandoned the practice of law and engaged in another occupation may be a surety on an undertaking on appeal.[1,*]

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was denied, and upon appeal the order denying it was affirmed by the general term of the supreme court, first department.

The general term opinion is reported *ante*, p. 191. That of the special term (Filed March 4, 1885), is as follows:

"DONOHUE, J.—The action is one for the defendant's fraud, and on the face of the complaint depends on the proof of fraud, and if the cancellation could not be effected, it might have been held for the relief of getting damages. I think the costs are a part of the judgment, and should be enforced as the gravamen of the complaint granting plaintiff an order of arrest.

"Motion denied."

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Stringham *v.* Stewart.

Where an undertaking on appeal was objected to because one of the sureties named therein was an attorney and counselor, and it appeared that such surety had relinquished the practice of law more than fourteen years before and engaged in another occupation in which he still continued,—*Held*, that the objection should be overruled;[1] that the provision in rule 5 of the general rules of practice prohibiting attorneys and counselors from acting as sureties was designed to protect attorneys from the importunities of their clients, [2] and has no application where an attorney has abandoned the practice of law and taken up some other pursuit.[4]

Evans *v.* Harris (47 *N. Y. Super.* [15 *J. & S.*] 366), approved and followed; [3] Wheeler *v.* Wilcox (7 *Abb. Pr.* 73), not followed.[5]

(*Decided February* 12, 1886.)

Objection by plaintiff-respondent to an undertaking on appeal.

The plaintiff having recovered a judgment in his favor, in this action brought to recover damages for personal injuries, the defendant appealed and served the undertaking on appeal to which objection is made. Other facts are stated in the opinion.

A. H. Dailey, for plaintiff-respondent.

Cited in support of contention that an attorney cannot be bail or surety upon an undertaking: Coster *v.* Watson, 15 *Johns.* 535; Wheeler *v.* Wilcox, 7 *Abb. Pr.* 73; Craig *v.* Scott, 1 *Wend.* 35; Cases referred to in Hun's Edition of the General Rules of Practice under Rule 5; Miles *v.* Clark, 2 *Bosw.* 709; S. C., aff'd, 4 *Id.* 632.

Henry H. Rice, for defendant-appellant.

BARTLETT, J.—The plaintiff objects to the defendant's undertaking on appeal in this case, on the ground that Henry Hilton, one of the sureties therein, is an attorney. In answer to this objection the defendant files an affidavit showing that the proposed surety

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relinquished the practice of the law upwards of fourteen years ago, and has been engaged in other business ever since. Rule 5 of the General Rules of Practice provides as follows: "In no case, shall an attorney or counselor be surety on any undertaking or bond required by law, or by these rules, or by any order of a court or judge, in any action or proceeding, or be bail in any civil or criminal case, or proceeding." The question now presented is whether this rule applies to a person whose name still appears on the roll of attorneys, but who abandoned the practice of the law many years ago to engage in another occupation in which he still continues. I do not think it does.

[*] The general term of the New York superior court held in 1881, that the rule did not preclude an attorney that had left the law for another vocation more than a year before, from becoming a surety on an undertaking on attachment (Evans *v.* Harris, 47 [*] *N. Y. Super.* [15 *J. & S.*] 366). This decision is criticised on the ground that the English cases referred to in the opinion of the court do not sustain the propositions they are cited to support. However this may be, I think the conclusion reached by the superior court is fully warranted by reference to the reason which led to the establishment of the rule.

[*] The disqualification of attorneys to become bail is derived from the English practice, and all the authorities agree that it had its origin in the desire to protect attorneys against the importunities of their clients.

Mr. Tidd, in his celebrated work on the practice of the court of king's bench, expressly declares that the rule was calculated for the benefit of attorneys (*Tidd's Prac.* 230), and the language of the court is to the same effect in the case of Dixon *v.* Edmunds (2 *Anstruther* [*Eng. Exch.*] 356).

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[*] Plainly, the reason thus assigned can have no existence in the case of an attorney who has abandoned his vocation as such. A lawyer who has become a merchant is in no danger of being importuned by clients when he gives up the law. If the construction now contended for was adopted, it would forever disqualify every person admitted to the bar, so long as his name appeared upon the roll of attorneys, although he might have studied only with reference to the advantage it would give him in the conduct of his affairs as a business man, and might never have gone into court in his life except when he was sworn in as an attorney.

[*] There is an intimation in a single case decided in New York, at chambers (Wheeler *v.* Wilcox, 7 *Abb. Pr.* 73), that in order to remove the disqualification established by the rule, the proper course is for the attorney to procure his name to be stricken from the roll. While this course would seem to be essential in the case of a practicing attorney, I do not regard it as necessary under such circumstances as are presented here. I do not think the words "attorney or

[*] counselor" in Rule 5 were intended to relate to an attorney or counselor who has permanently abandoned the practice of the law and taken up some other pursuit. Such clearly appears to be the case with ex-Judge Hilton.

The objection to the undertaking is therefore overruled.

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THE PUTNAM COUNTY CHEMICAL WORKS, RESPONDENT, *v.* JOCHEN, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, JANUARY, 1886.

§§ 416, 638.

Attachment.— When not vacated for non-service of summons.— When judgment by default should be opened unconditionally.

Where an attachment was issued before the service of the summons in an action, and thereafter, upon a return of service thereof by the sheriff, judgment was entered by default and execution issued, and it appeared that the defendant was never actually served with the summons, but was sufficiently advised of the proceedings to protect his rights,—*Held*, that the judgment and execution should be set aside and the defendant allowed to come in and defend unconditionally, but that the attachment should not be vacated.

(*Decided January* 29, 1886.)

Appeal by defendant from order denying his motion to vacate attachment, judgment and execution, herein; also appeal from an order denying a motion for leave to renew said motion.

This action was brought to recover $515.93, the agreed price of certain chemicals alleged to have been sold and delivered to the defendant by the plaintiff. August 28, 1885, an attachment against the property of the defendant was granted on the ground that he was a non-resident of the State, under which a levy was, on the same day, made on the defendant's property in Brooklyn. The summons and complaint were also delivered to the sheriff of Kings county for service, who made a return certifying that personal service thereof had been made on the defendant at North Twelfth and Fifth streets, Brooklyn, on August 31,

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1885. Thereafter judgment by default was entered against the defendant and an execution issued thereon to the sheriff of Kings county. On October 2, 1885, the defendant, on affidavits showing that he had never been served with the summons in the action, procured an order to show cause why the attachment, judgment and execution should not be vacated and set aside.

This motion was heard October 8, 1885, before Mr. Justice LAWRENCE, at special term, who filed the following memorandum of his decision:

"This case is not distinguishable in principle from that of Hilton *v.* Thurston (1 *Abb. Pr.* 318). The judgment was not irregular (see opinion of DALY, J., in Hilton *v.* Thurston). If the defendant has a defense he should, however, be permitted to present it. The terms will be that he serve a verified answer within five days from the entry of the order on this decision, and that the judgment and all proceedings stand as security, unless the defendant shall give a bond with two sureties, to be approved by the court, that he will pay any judgment that the plaintiff may recover, and that he accept short notice of trial for the November term."

An order was entered in conformity with this decision which is one of the orders appealed from.

On other affidavits showing that the summons and complaint were not served on the defendant, he moved for leave to renew said motion. This last motion was heard before Mr. Justice ANDREWS, at the New York county special term, and denied, the justice writing the memorandum:

"I do not see that the papers now submitted present any facts which would justify me in granting leave to renew the motion.

"In his affidavit used on the former motion the defendant swore positively that no papers had been served upon him, and Judge LAWRENCE's decision

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apparently assumes that such statement was true. The affidavit of the deputy sheriff merely corroborates that statement as true, and furnishes no reason for permitting a renewal of the motion. If the former decision is believed to be erroneous, the defendant's only remedy is by taking an appeal, as I cannot review the decision of another judge."

From the order thereupon entered the defendant appealed. Both appeals were heard together.

Thomas Darlington (*B. F. Edsall*, attorney), for defendant-appellant.

The attachment should be vacated. Section 638 of the Code of Civil Procedure expressly provides that personal service of the summons must be made upon the defendant against whose property the warrant is granted, within thirty days after the granting thereof, or else before the expiration of the same time, service of the summons by publication must be commenced, or service thereof must be made without the State. The provisions of this section have not been complied with. By an omission to comply therewith, the attachment was thereby invalidated, and should have been set aside. Taddiken *v.* Cantrell, 1 *Hun*, 710; Waffle *v.* Goble, 53 *Barb.* 517.

The judgment should be vacated and set aside. Section 416 of the Code of Civil Procedure says: "A civil action is commenced by the service of summons; but from the time of the granting of a provisional remedy, the court acquires jurisdiction and has control of all the subsequent proceedings. Nevertheless, jurisdiction thus acquired is conditional, and liable to be divested, in a case where the jurisdiction of the court is made dependent by a special provision of law upon some act, to be done after the granting of the provisional remedy." In this case, the jurisdiction the court acquired by the issuing of the provisional

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remedy,—*i. e.*, the warrant of attachment,—was conditional, and liable to be divested, being dependent by special provision of law—section 638 of the Code—upon the service of the summons personally, or the commencement of publication within thirty days thereafter; and this condition of maintaining the jurisdiction acquired by the provisional remedy not being complied with, the court was divested of jurisdiction, and the court had no jurisdiction when the judgment was entered, and the same is absolutely null and void. . . . .

It is a cardinal principle in the administration of justice, that no man can be divested of any right until he has had an opportunity of being heard. He must by service of process be brought into court, and if judgment is rendered against him before that is done, the proceeding will be as utterly void as though the court had undertaken to act where the subject matter was not within its cognizance. This is the rule in relation to all courts, with only this difference, that the jurisdiction of a superior court will be presumed until the contrary appears, whereas an inferior court and those claiming under its authority must show that it had jurisdiction. The distinction between superior and inferior courts is not of much importance in this particular case, for whenever it appears that there was a want of jurisdiction, the judgment will be void in whatever court it is rendered. Bloom *v.* Burdick, 1 *Hilt.* 130, 134; Williams *v.* Van Valkenburgh, 16 *How. Pr.* 144, 145; Starbuck *v.* Murray, 5 *Wend.* 148; Borden *v.* Fitch, 15 *Johns.* 121; Bigelow *v.* Stearns, 19 *Id.* 39; Mills *v.* Martin, 19 *Id.* 7; Foot *v.* Stevens, 17 *Wend.* 483; Hart *v.* Seixas, 21 *Id.* 40. . . .

A false return of a sheriff is no substitute for the personal service required by the section of the Code quoted, in order to commence a civil action and to obtain jurisdiction for the entry of a judgment.

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Judge JOHNSON, in the case of Williams *v.* Van Valkenburg above cited, says: "There is but one case that I have been able to find where a judgment without process served has been upheld. That is an anonymous case in 4 *How. Pr.* 112. The sheriff in that case undertook to serve a capias upon the defendant, but served it upon another person and returned it served upon the defendant. There was a judgment by default, and the court refused to set it aside on motion by the defendant. This was a decision at special term, and does not appear to have undergone any consideration. The ruling goes beyond any former case. It was a direct proceeding to set aside the judgment, and the return was unquestionably false. I think that decision is not law, and that it ought not to be followed." See also Van Rensselaer *v.* Chadwick, 7 *How. Pr.* 297; Campbell *v.* Self, 2 *Id.* 35.

The doctrine of *res adjudicata* does not apply to adjudications upon such motions, as it does to adjudications by judgment; and where the facts have materially changed since a former motion such motions may be renewed as a matter of right. Veeder *v.* Baker, 83 *N. Y.* 163; Riggs *v.* Pursell, 74 *Id.* 370; Belmont *v.* Erie Ry. Co., 52 *Barb.* 639; Erie Ry. Co. *v.* Ramsay, 57 *Id.* 449.

Edward D. Bettens (*Bettens & Lilienthal*, attorneys), for plaintiff-respondent.

The sheriff's certificate of service is in itself a complete proof of service of the summons. *Code of Civil Procedure*, § 434. . . . When the sheriff certifies to the service of a summons and the defendant confines himself (as in this case) to a simple denial of such service, it is the universal practice to sustain the service. Southwell *v.* Marryatt, 1 *Abb. Pr.* 218; Hunter *v.* Lester, 10 *Id.* 260. . . . The facts show that defendant is attempting to defraud the plaintiff.

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The court at special term requires satisfactory proof of non-service of summons before it will permit itself to be used for such a purpose. Southwell *v.* Marryatt, 1 *Abb. Pr.* 218. . . . Assume that the sheriff did make a mistake and serve the wrong party, the facts show that defendant knew from the outset of the attempted service, and simply held back waiting for the plaintiff to enter up judgment. This the court will not permit. As he waited until judgment was entered, he must wait now until the issues are tried. Hilton *v.* Thurston, 1 *Abb. Pr.* 318.

BRADY, J.—The defendant insists that the summons in this case was not served upon him; but if it was not served upon him as certified by the sheriff of Kings county, it was brought to his notice through the instrumentality of the deputy sheriff Hardoncourt. The latter left the summons, he says, with a man named Brown, at his place of business, but had no knowledge what became of it except what Brown told him, and what Brown told him is not revealed. On being asked who Brown was, he said: "I don't know; he works in a factory there." What he meant by "there" is not disclosed; but by connection with other facts and circumstances it may be and doubtless was the factory on the corner of North Twelfth and Fifth streets, Williamsburgh, Brooklyn, E. D., Kings county.

One Blum, however, states that while he was working at the place just referred to and in a molasses factory, and on or about August 31, 1885, a man left some papers with him requesting him to give them to the boss (meaning the defendant) of the chemical factory, which was also situated on that corner. The person who made this request left his card also which bore the name of deputy Hardoncourt. The deputy did his work in a slovenly way. He left the papers he was required to serve with a stranger, and, upon the faith

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of the papers having reached the defendant, returned the process as served. Blum (we have no affidavit from Brown) left the papers behind a clock on the premises of his employer, and some days after, on looking for them, learned that they were not there. These papers, however, reached the hands of the defendant's bookkeeper, one Anderson, who informed the defendant of the facts detailed by Blum, and placed the papers in the hands of his attorney. Whether it was the defendant's attorney or Anderson's does not appear, but it does clearly appear that the defendant's attorney and Anderson's were in communication about the process.

Although the service of the summons was not made in a due and orderly manner, and exception may, therefore, be justly taken to the proceedings in that respect, nevertheless, the defendant was sufficiently advised of the proceedings to protect his rights, and the order made on the motion has done so by allowing him to come in and defend. The learned justice in the court below, however, vacated the judgment conditionally, requiring the defendant to give security. In this we think he erred. The attachment was not vacated, but continued, and this was all that the plaintiff could justly expect under the circumstances.

It is not necessary to seek for authorities to sustain the order holding the attachment under circumstances such as are disclosed herein. The object of the summons was to advise the defendant of the commencement of this action, which had been preceded by an attachment of which the defendant does not assert that he was ignorant. Indeed, the facts and circumstances warrant the impression that the course of events was watched and uninterrupted with a view to the motions made, and from the result of which the appeals are taken. This is a technical mode of action, but not always reliable. Here it fails.

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In Hilton v. Thurston (1 *Abb. Pr.* 318), the facts were similar to those disclosed herein, and there the defendant did not succeed in avoiding the consequences.

The order granted should, however, be modified as suggested, and the defendant allowed to appear and defend on the payment of the costs of motion.

The appeals here are thus disposed of, without costs of appeal to either party.

DAVIS, P. J., and DANIELS, J., concurred.

COUCH, AS ASSIGNEE, ETC., *v.* MILLARD, ET AL.

SUPREME COURT, FOURTH DEPARTMENT, ONEIDA COUNTY, SPECIAL TERM, DECEMBER, 1885.

§§ 3230, 3253.

Costs.—Power of referee to award in equity action.—Review of his determination.—Extra allowance.

In an action to set aside a chattel mortgage as fraudulent, and for an accounting of the goods taken thereunder, where the mortgage is sustained, but it was found that there was a surplus in the defendants' hand after paying their claims, to which the plaintiff is entitled, the costs of the action are in the discretion of a referee, appointed to hear and determine the issues, and after he has exercised that discretion, and found that both plaintiff and defendants should have costs of the action, to be paid out of any funds coming into the plaintiff's hands by virtue of any judgment in the action, his decision cannot be reviewed at special term, but can only be reviewed by an appellate court having power to review the case upon the merits.

Where, in such a case, it appears that the action was both difficult and extraordinary, and that much professional time and skill were bestowed upon it,—*Held*, that the granting of an extra allowance

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was in the discretion of the court, and one should be granted the defendant suitable and commensurate with the skill and service bestowed; that the chattel mortgages ought to be set aside was the subject matter of the litigation, and its amount the proper basis on which the allowance should be made.*

Burke v. Candee (63 *Barb.* 552), followed.

(*Decided December*, 1885.)

Motion by defendants for an extra allowance.

The action was brought by the plaintiff as assignee for the benefit of creditors, of the firm of Millard, Underwood & Co., to set aside as fraudulent and void a chattel mortgage given by said assignor to the defendants, to indemnify them against loss from $23,000 of accommodation acceptances, made by them for the assignors; the plaintiff also sought an accounting for the property taken by the defendants under said mortgage.

The issues in the action were duly referred to W. G. Robinson, who held that the chattel mortgage was not fraudulent and void, but valid; took an account of the property taken by the defendants thereunder, and found that there was a surplus remaining in their hands of $6,808.97, which the plaintiff was entitled to recover. The referee gave judgment against the defendants "as upon an accounting, for said sum of $6,808.97, with costs and disbursements in the action, both of said plaintiff and said defendant, to be chargeable to, and to be first paid out of the said fund that may come to said plaintiff in his representative or trust capacity, by virtue of any judgment in this action."

Thereafter, before the entry of judgment, the defendants made this motion, on the ground that the action was difficult and extraordinary.

* See Note on Additional Allowances, *ante*, 214, *et seq.*

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W. N. Poucher and *D. W. Gurnsey*, for defendants and motion.

George W. Parkhurst, for plaintiff, opposed.

HARDIN, J.—Costs of this action were in the discretion of the referee, and he has passed directly upon the question as one within his discretion (*Code of Civil Procedure*, § 3230; Chipman *v.* Montgomery, 63 *N. Y.* 221; Lawrence *v.* Lindsay, 68 *Id.* 108; Blank *v.* O'Brien, 23 *Hun*, 82).

After the exercise of such discretion by the referee, it is not within the province or power of the special term to overhaul and overturn the conclusion of the referee (Stevens *v.* Veriane, 2 *Lans.* 90; Woodford *v.* Bucklin, 14 *Hun*, 444; opinion of HARDIN, J., and case cited therein; McLean *v.* Stewart, 14 *Hun*, 472; opinion HARDIN, J., and cases cited therein.

Whether this case fell within the case of Ten Eyck *v.* Holmes (3 *Sandf. Ch.* 428), and other kindred cases or not, was a question for the referee to consider and decide, and his conclusion must be accepted, until, disturbed by an appellate court having power to review the case upon its merits, and the decision of the referee in regard to costs (Woodford *v.* Bucklin, *supra*).

In Burk *v.* Candee (63 *Barb.* 552), I had occasion to state the rules applicable to applications for an extra allowance in difficult and extraordinary cases, and notwithstanding the adoption of the Code of Civil Procedure since that decision, the general principles then laid down remain. That case has been approved, cited and followed several times (Bank *v.* Sand, 21 *N. Y. Weekly Dig.* 47; Tolman *v.* Syracuse, B. & N. Y. R. R. Co., 31 *Hun*, 397, 403; Decolmyn *v.* Chamberlain, 48 *How. Pr.* 413).

Adopting the principles there laid down, nought

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remains in this case to be done, except to make an application of them to the case in hand.

It is very apparent that this case was both difficult and extraordinary, and required care, skill, ability and patient industry to be bestowed in its trial before the referee, and in presenting properly the law and facts in arguments to the learned referee.

The proofs are very clear that much professional time and skill were bestowed upon the case. Therefore, an allowance suitable and commensurate with the skill and service bestowed should be allowed, in order to meet the provisions of the law in that regard. It is very properly suggested by the learned counsel of the plaintiff, that such applications are addressed to the discretion of the court. Indeed, that was held in Hurd *v.* Farmers' Loan Co. (16 *N. Y. Weekly Dig.* 480), and in the exercise of discretion, the court said a proper case therein had not been made for an allowance.

Here, an assignee assaulted a security held by defendants to indemnify them against accommodation liabilities, assumed for the assignors, and sought to strike it down as fraudulent and void. He failed in the principal purpose of his bill, and within cases not unfamiliar he has been charged with costs payable "first out of the fund."

No good reason is furnished for withholding the application of the principles stated in Bank *v.* Sand (*supra*). The principal subject matter of litigation here was the chattel mortgage of $26,000. That has been sustained by the referee. Upon that mortgage it is proper to make the allowance. It is not easy to say just what sum shall compensate the parties for the expenditures of skill, labor and professional ability required by the protracted trial. But upon the proofs before the court, together with the concessions made

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upon the argument, the conclusion is reached that three per cent. on $26,000 will be suitable.

An order to that effect may be served, and, if the form is agreed to, entered in Oswego; if not assented to in form, it may be settled before me on two days' notice, after service of a copy of this opinion.

MOONEY v. RYERSON AND ANOTHER, IMPLEADED, ETC.*

CITY COURT OF NEW YORK, SPECIAL TERM, DECEMBER, 1885.

§§ 525, 779.

Verification of pleading.—Instance of, held sufficient.—Remedy when order does not contain proper recitals.—Non-payment of motion costs.—Stay.

Where, in an action to recover damages for personal injuries to plaintiff's wife, alleged to have been caused by the negligence of defendants' servants, two of the defendants, who were alleged to be partners, united in an answer denying certain allegations in the complaint, and denying any knowledge or information sufficient to form a belief as to the other allegations thereof,—*Held*, that a verification of the answer by one only of the defendants was sufficient.

Where an order does not contain the proper recitals, the proper practice is to move for a re-settlement thereof.

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* An appeal was taken by the plaintiff to the general term of the city court of New York from the order entered herein, and argued jointly with an appeal from an order granting a motion requiring the plaintiff to accept the answer of the defendants, Ryerson and Brown. The orders appealed from were affirmed January 27, 1886; the court (MCADAM, Ch. J., and HALL, J.), filing the following memorandum of their decision: "There are no merits in these appeals. Orders affirmed, with costs."

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Mooney v. Ryerson.

Instance of a case in which the proceedings were stayed by the non-payment of motion costs.
(*Decided December* 7, 1885.)

Motion by plaintiff for judgment, etc.

This action was brought by the plaintiff, as the husband of one Johanna Mooney, to recover damages for injuries alleged to have been received by her, through the negligence of servants of the defendants Ryerson and Brown, and of the defendant, the Third Avenue Railroad Company. The first paragraph of the complaint alleged that the plaintiff was the husband of said Johanna Mooney; the second, that the defendants Ryerson and Brown were copartners, and as such, owned and operated a certain line of cabs or vehicles; the third, that the defendant, the Third Avenue Railroad Company, was a domestic corporation, and owned and operated the Third Avenue Railroad in the city of New York; the fourth set out that on May 5, 1885, at the corner of Third avenue and Thirty-sixth street, New York city, said Johanna Mooney was, through the negligence of the servants of the defendants Ryerson and Brown, in charge thereof, run against and knocked down by one of said defendant's cabs; the fifth alleged that before she was able to arise, she was, through the carelessness and negligence of the servants of the defendant, the Third Avenue Railroad Company, in charge thereof, run upon and over by a car belonging to said defendant, and set forth injuries thereby received by said Johanna Mooney; the sixth alleged that the separate and independent acts of negligence of the servants of the defendants, respectively conspired "to produce the injuries complained of, but in what proportion each contributed, this plaintiff is ignorant, and it is impossible to determine the same;" and the seventh paragraph set out the loss which the plaintiff had sustained by reason thereof.

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The answer of the defendants Ryerson and Brown, omitting title, prayer for judgment, and signature, was as follows:

"The defendants William T. Ryerson and Ira Brown, appearing herein by Van Winkle, Candler & Jay, their attorneys, by this, their joint and separate answer to the complaint herein, respectfully show to the court as follows:

"They deny that they have any knowledge or information sufficient to form a belief as to any of the allegations in the first, third and fifth paragraphs of said complaint contained, and they deny all the allegations in the second, fourth, sixth and seventh paragraphs of said complaint contained."

The answer was verified by the defendant Ryerson only; the verification being in the usual form of a verification by a party pleading alone.

The plaintiff, claiming that the answer was not served in time, returned it on that ground, and because it was not folioed. Said defendants thereupon moved that the plaintiff be required to accept service thereof, and their motion was granted by order entered November 27, 1885, with ten dollars costs.

On December 4, 1885, the plaintiff made this motion, asking that he be permitted to enter judgment against the defendant Ira Brown, or against the defendants Ryerson and Brown, for the reason that the answer was not properly verified, it having been verified only by the defendant Ryerson, and not stating that said Ryerson was the agent, partner, or joined in interest with the defendant Brown, or acquainted with the facts, and not giving any reason why it was not verified by said Brown; that said defendants lose the benefit of the order of November 27, and that it be set aside because their answer, used on the motion, but which is not recited in the order as having been so used, had not been filed; and that the portion of the

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answer denying that the defendants have any knowledge or information sufficient to form a belief as to any of the allegations in the third and fifth paragraphs of the complaint, be stricken out as improper or irrelevant, or frivolous or sham.

William Livingston Bruen, for plaintiff and motion.

Van Winkle, Candler & Jay, for defendants, Ryerson and Brown, opposed.

NEHRBAS, J.—If the order entered herein on November 27 does not contain the proper recitals, then the proper practice is to move for a re-settlement of the order, which result cannot be reached by a motion for judgment. The answer, I think, was used upon the former motion, and should be recited in the order and filed with the papers. But this motion is not now before me.

The verification of the answer is in proper form, and the pleadings being made by two of the defendants, the verification by one of them is sufficient. I cannot understand the multitudinous relief which the plaintiff's attorney asks for other than as I have stated. If plaintiff desires information as to any copartnership existing between defendants, his proper course would seem to be to examine the defendants.

But aside from all this, the court rules have not been complied with in obtaining the order to show cause upon this motion. The costs of the previous motion have not been paid, and it seems to me plaintiff's proceedings are stayed. Motion denied, with costs.

NOTE ON THE VERIFICATION OF PLEADINGS IN ACTIONS UNDER THE CODE OF CIVIL PROCEDURE.

When Pleadings to be Verified. The general rule is that "where a pleading is verified, each subsequent pleading, except a demurrer, or

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the general answer of an infant by his guardian *ad litem*, must also be verified." *Code of Civil Procedure*, § 523.

By a subsequent pleading is meant one subsequent in order, or in answer to a previous pleading, and not one subsequent in time. Hempstead *v.* Hempstead, 7 *How. Pr.* 8.

In Hempstead *v.* Hempstead (*supra*), the original complaint and answer were verified. *Held*, that an amended complaint was not a subsequent pleading, and it was not necessary to verify it.

Although it is not usually necessary to verify an answer to an unverified complaint (White *v.* Bennett, 7 *How. Pr.* 59; Winne *v.* Sickles, 9 *Id.* 217); it *may* be verified, and if it is, a reply thereto, if any, *must* be verified. Levi *v.* Jakeways, 4 *How. Pr.* 126; Roscoe *v.* Maison, 7 *Id.* 121.

To entitle a party to require subsequent pleadings to be verified, his own pleading must not only be verified, but a copy of the verification must be served with it. Hughes *v.* Wood, 5 *Duer*, 603, *note;* and see cases cited below. A copy of the entire affidavit verifying the pleading should be served with it, and if the copy is incomplete or defective it is ineffectual, and the pleading may be treated as unverified (*Code of Civil Procedure*, § 528; Graham *v.* McCoun, 5 *How. Pr.* 353; Lane *v.* Morse, 6 *Id.* 394; Hubbard *v.* Natl. Protective Ins. Co., 11 *Id.* 149; People *v.* Allen, 14 *Id.* 334; Meads *v.* Gleason, 13 *Id.* 309; Hughes *v.* Wood, *supra;* Trowbridge *v.* Didier, 4 *Duer*, 448; Williams *v.* Riel, 5 *Id.* 601; S. C., 11 *How. Pr.* 374; Treadwell *v.* Fassett, 10 *Id.* 184; Littlejohn *v.* Munn, 3 *Paige*, 380); as, for example, where the name of the officer before whom it was verified is omitted (Graham *v.* McCoun, 5 *How. Pr.* 353; Hughes *v.* Wood, 5 *Duer*, 603, *note*); or the name of the affiant (Hughes *v.* Wood, *supra*), or the venue of the affidavit (Lane *v.* Morse, 6 *How. Pr.* 394).

COMPLAINT. Except in a few cases (see below), where special provision is made, a plaintiff is not compelled to verify his complaint. The verification is no part of the pleading (George *v.* McAvoy, 6 *How. Pr.* 200); and the fact that a complaint is unverified or that its verification is defective, does not render it demurrable (Webb *v.* Clark, 2 *Sandf.* 647), or furnish ground for setting it aside (Fitch *v.* Bigelow, 5 *How. Pr.* 237; Waggoner *v.* Brown, 8 *Id.* 212; Strauss *v.* Parker, 8 *Id.* 342; Williams *v.* Riel, 11 *Id.* 374; S. C., 5 *Duer*, 601; and see Van Horne *v.* Montgomery, 5 *How. Pr.* 238), or affect the validity of a judgment subsequently entered (Quin *v.* Tilton, 2 *Duer*, 648). The fact that an answer is verified does not make it necessary that an amended complaint be verified. Hempstead *v.* Hempstead, 7 *How. Pr.* 8. In an action to charge a joint debtor, not summoned,

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with a judgment, the complaint must be verified. *Code of Civil Procedure*, § 1938.

ANSWER. If the complaint is verified, the answer must usually be verified (*Code of Civil Procedure*, § 523); but if the complaint is not, the general rule is that the verification is optional, and its absence does not affect the validity of the pleading. See White *v.* Bennett, 7 *How. Pr.* 59; Winne *v.* Sicklos, 9 *Id.* 217.

A defendant served with a verified complaint must serve a verified answer notwithstanding the copy complaint served on a co-defendant was not verified, and that although he joins with such defendant, their interests being several. Wendt *v.* Peyser, 14 *Hun*, 114.

A plaintiff who has served an unverified complaint cannot compel the defendant to serve a verified answer by serving as an amended complaint a verified copy of the same complaint; the verification is not a part of the pleading. George *v.* McAvoy, 6 *How. Pr.* 200; and see White *v.* Bennett, 7 *Id.* 59.

"A defense does not involve the merits of the action" cannot be pleaded unless it is verified. *Code of Civil Procedure*, § 513.

To require the plaintiff in an action by or against a corporation to prove the existence of the corporation, the answer must be verified. *Code of Civil Procedure*, § 528.

The general answer of an infant by his guardian *ad litem* need not, in any case, be verified. *Code of Civil Procedure*, § 523.

In an action for divorce by reason of the defendant's adultery, "the answer of the defendant may be made without verifying it, notwithstanding the verification of the complaint." *Code of Civil Procedure*, § 1757.

Before the enactment of the last nine chapters of the Code of Civil Procedure, the authorities as to the necessity of verifying the answer in an action for divorce were not harmonious (*Vide*, Anable *v.* Anable, 24 *How. Pr.* 92; Sweet *v.* Sweet, 15 *Id.* 169; Olney *v.* Olney, 7 *Abb. Pr.* 350); and Mr. Throop states in a note to section 1757 that the provision quoted was inserted to settle this question.

"The verification may be omitted, in a case where it is not otherwise specially prescribed by law, where the party pleading would be privileged from testifying, as a witness, concerning an allegation or denial continued in the pleading" (*Code of Civil Procedure*, § 528; and see *post*, p. 441); but "a defendant is not excused from verifying his answer to a complaint charging him with having confessed or suffered a judgment, or executed a conveyance, assignment, or other instrument or transferred or delivered money, or personal property, with intent to hinder, delay, or defraud his creditors; or with being a party or privy to such a transaction by another person, with like intent

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towards the creditors of that person; or with any fraud whatever, affecting a right or the property of another." *Code of Civil Procedure*, § 529.

In Frist *v.* Climm (6 *N. Y. Civ. Pro.* 30), it was held that section 529 of the Code is aimed at fraudulent transfers and the like, but in other actions in which the defendant is charged with crimes or other misdemeanor which he may serve his answer unverified.

False Pretenses. Where a complaint set out a sale of goods by plaintiff to defendant induced by the alleged false and fraudulent representation of the defendant and asked judgment for the contract price,—*Held*, that the defendant had a right to serve an unverified answer. Frist *v.* Climm, 6 *N. Y. Civ. Pro.* 30.

Libel. It is not necessary to verify the answer in an action for libel, even though the complaint be verified. Wilson *v.* Bennett, 2 *N. Y. Civ. Pro.* 34.

Fraudulent assignment. Defendant is not excused from verifying his answer on the ground that the complaint charges him with fraud in making the assignment which the action is brought to set aside. Welcott *v.* Winton, 8 *Abb. Pr.* 422.

Counter-claim. "Where the complaint is not verified, and the answer sets up a counter-claim, and also a defense by way of denial or avoidance, the affidavit of verification may be made to refer exclusively to the counter-claim." *Code of Civil Procedure*, § 527.

Reply. If the answer is verified, a reply thereto must be verified (*Code of Civil Procedure*, § 523; Levi *v.* Jakeways, 4 *How. Pr.* 126; Roscoe *v.* Maison, 7 *Id.* 121), unless the party making it "would be privileged from testifying as a witness concerning an allegation or denial contained" therein. *Code of Civil Procedure*, § 523; and see *post.*

Pleading containing Matters as to which Party Privileged from Testifying.

The Code (§ 523), provides that the verification of a pleading "may be omitted, in a case where it is not otherwise specially prescribed by law, where the party pleading would be privileged from testifying, as a witness, concerning an allegation or denial contained in the pleading."

The section applies only where the party would be privileged from testifying for his own protection and at his option, and not where he would be permitted to testify by a prohibition of law founded on the grounds of public policy. Olney *v.* Olney, 7 *Abb. Pr.* 350. To the contrary is Sweet *v.* Sweet, 15 *How. Pr.* 169.

The defendant may omit the verification of his answer as respects

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all its allegations, wherever it appears from the complaint that he would be excused from testifying as to any matter denied by it. Blaisdell *v.* Raymond, 5 *Abb. Pr.* 144; aff'd, 6 *Id.* 148; Wheeler *v.* Dixon, 14 *How. Pr.* 151; Moloney *v.* Dows, 2 *Hilt.* 247; affg. S. C. *sub nom.* Moloney *v.* Dows, 15 *How. Pr.* 261; Springstead *v.* Robinson, 8 *How. Pr.* 41; Scoville *v.* New, 12 *Id.* 319; People *ex rel.* Hackley *v.* Kelly, 24 *Id.* 369; S. C., 24 *N. Y.* 74; *In re* Tappan, 9 *How. Pr.* 394).

One who desires to avail himself of this privilege must do so by denying the allegations and omitting to verify his pleading. A statement that he declines to answer certain allegations on the ground that it might subject him to a criminal prosecution must be treated as an admission (Scoville *v.* New, 12 *How. Pr.* 319; and see cases last above cited), or where that is the only allegation in an answer, it may be treated as frivolous (Springstead *v.* Robinson, 8 *How. Pr.* 41. *Contra*, Thomas *v.* Harrop, 7 *How. Pr.* 25, where the question was not involved in the determination made, and the decision as to this point was *obiter*).

It is not necessary that all the statements in a pleading should be such as would excuse a party from testifying, but the verification may be omitted when any one of them are of that character. Clapper *v.* Fitzpatrick, 8 *How. Pr.* 314.

It is good practice where a pleading is not verified because the party would be privileged from testifying as a witness concerning any allegation or denial contained in it, but which but for that should have been verified, to serve with it a general affidavit stating the reason why the verification is omitted. Springstead *v.* Robinson, 8 *How. Pr.* 41; Wheeler *v.* Dixon, 14 *Id.* 151; Roach *v.* Kivlin, 25 *Hun*, 150.

And where it does not appear from the pleading itself that the party is so privileged it is necessary that there be such an affidavit. Lynch *v.* Todd, 13 *How. Pr.* 546; Blaisdell *v.* Raymond, 5 *Abb. Pr.* 144; Springstead *v.* Robinson, 8 *Id.* 41; Wheeler *v.* Dixon, 14 *Id.* 151.

Thus, *e. g.*, in an action to recover back money received contrary to the statute against betting and gaming, where the complaint did not show whether defendant received it as stake-holder or winner, it was held that the plaintiff was entitled to a verified answer, unless the defendant made it appear affirmatively that his testimony as to the truth of the matter denied would have a tendency to implicate him in the capacity of winner. Lynch *v.* Todd, 13 *How. Pr.* 546.

But such an affidavit is not *necessary* where it does appear from the pleadings that the party is so privileged. Wheeler *v.* Dixon, 14 *How. Pr.* 151; Clapper *v.* Fitzpatrick, 8 *Id.* 314; Blaisdell *v.* Raymond,

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5 *Abb. Pr.* 144; S. C. aff'd, 6 *Id.* 148; Wheeler *v.* Dixon, 14 *How. Pr.* 151.

Under the Code of 1848, the verification of the pleading might be omitted, when the matter was such as might aid in forming a chain of testimony to convict of a criminal offense, if properly receivable in evidence. If any part of the pleading is such, the pleading need not be verified (Art. 1, § 1, *Constitution of N. Y.;* Henry *v.* Salina Bank, 1 *N. Y.* 89; Thomas *v.* Harrop, 7 *How. Pr.* 57; Hill *v.* Muller, 2 *Sandf.* 684; White *v.* Cummings, 8 *Id.* 716; Clapper *v.* Fitzpatrick, 3 *How. Pr.* 314; Bailey *v.* Dean, 5 *Barb.* 297), and if any one of several persons offering such pleading would be thus excused, it was held that none of them need verify it (Clapper *v.* Fitzpatrick, 3 *How. Pr.* 314; S. C., 1 *Code R.* 69), but this does not now seem to be the rule and only the party who would be criminated by verifying the pleading is excused from doing so. *Code of Civil Procedure*, § 523.

The fact that admitting allegations in a complaint will subject the defendant to a criminal prosecution, will not authorize their being stricken out, since the verification may be omitted. Davenport Glucose Manfg. Co. *v.* Taussig, 5 *N. Y. Civ. Pro.* 69.

By whom made.

By Party. The general rule is that "the verification must be made by the affidavit of the party, or, if there are two or more parties united in interest, and pleading together, by at least one of them who is acquainted with the facts." *Code of Civ. Pro.* § 525.

The guardian *ad litem* of an infant plaintiff is a party within the meaning of this provision, and may verify a complaint as plaintiff, and not as an agent or attorney (Anable *v.* Anable, 24 *How. Pr.* 92, and see Rogers *v.* Cruger, 7 *Johns.* 564; Hill *v.* Thacter, 3 *How. Pr.* 407), but if the verification was sworn to by the guardian before he was actually appointed such, it is insufficient. Hill *v.* Thacter, *supra.*

The party in interest, although not a party to the record, may verify a pleading. Taber *v.* Gardner, 6 *Alb. Pr. N. S.* 147.

Where defendants are united in interest and plead together, one of them can verify. It is not necessary to state that he is acquainted with the facts where the verification is positive and absolute. The fact that the complaint charges the defendants, and each of them, with an alleged wrong, does not alter the fact that the defendants are united in interest and plead together (Zollner *v.* Newberger, 1 *N. Y. Monthly Law Bull.* 29; and see Mooney *v.* Ryerson, *ante*, p. 435), where it was held that in an action against persons alleged to be partners for damages resulting from the negligence of their servants; a joint answer was sufficiently verified when verified by one only of the defendants.

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Note on the Verification of Pleadings.

Every party who unites in a pleading whose interest is several, must verify it (Gray *v.* Kendall, 5 *Bosw.* 666; S. C., 10 *Abb. Pr.* 66; Young *v.* Seely, 12 *How. Pr.* 395; Hull *v.* Ball, 14 *Id.* 305; Read *v.* Butler, 2 *Hilt.* 589; Andrews *v.* Storms, 5 *Sandf.* 609; Alfred *v.* Whatkins, 1 *Code R. N. S.* 343; Hartlay *v.* Ritter, 9 *Abb. Pr.* 400; S. C., *sub nom.* Harlay *v.* Ritter, 18 *How. Pr.* 147), and a joint and several answer should be sworn to by all the defendants joining therein. Fulton Bank *v.* Beach, 6 *Wend.* 30.

In an action against husband and wife, to avoid a deed of lands made since 1848, by a third person to the wife, as fraudulent as against the grantor's creditors, the answer must be verified by both husband and wife. The wife's interest, in a legal point of view, is distinct from that of her husband. Her right under the deed, if valid, would amount to a separate estate. Young *v.* Seely, 12 *How. Pr.* 395; Read *v.* Butler, 2 *Hilt.* 589; and see Hartlay *v.* Ritter, 9 *Abb. Pr.* 400; S. C., *sub nom.* Harlay *v.* Ritter, 18 *How. Pr.* 147.

In an action against a husband and wife, where the complaint claims damages against both jointly, the answer may properly be verified by the husband only, even though the contract sued on relates to the estate of the wife. Hartley *v.* James, 18 *Abb. Pr.* 299.

The maker and indorser of a note are not united in interest, although their defenses are indentical; and their joint answer, verified by one only, may, as respects the other, be struck out as being unverified. Andrews *v.* Storms, 5 *Sandf.* 609; Hull *v.* Ball, 14 *How. Pr.* 305; Alfred *v.* Whatkins, 1 *Code R. N. S.* 343.

Where, in an action against partners, the complaint contained two counts, one being for a balance of moneys deposited with them as bankers, and the second for moneys received by the defendants from and to the use of the plaintiff, and an answer was served, admitting the depositing of the moneys alleged in the first count; denying that they received moneys to the use and benefit of the plaintiff, as alleged in the second count of the complaint, and denying knowledge or information sufficient to form a belief as to a demand and refusal to pay the moneys deposited, which answer was verified by only one of the defendants, who did not state that he is acquainted with the facts, and was returned on the ground, among others, that it should have been verified by both defendants, or by one acquainted with the facts, and judgment entered against the defendants,—*Held*, that the judgment should be vacated as to the defendant who made the verification, but not as to the other. Lacy *v.* Wilkinson, 7 *N. Y. Civ. Pro.* 104.

Where the copies of the complaint served on two defendants were verified, and that served on a third was not, and the three defend-

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ants, although their interests were several, served and joined in an unverified answer,—*Held*, that the defendants who were served with a verified complaint should have verified the answer. Wendt *v.* Peyser, 14 *Hun*, 114.

DOMESTIC CORPORATION. "Where the party is a domestic corporation, the verification must be made by an officer thereof." *Code of Civil Procedure*, § 525, subd. 1.

THE PEOPLE OR A PUBLIC OFFICER. "Where the people of the State are, or a public officer in their behalf, is the party, the verification may be made by any person acquainted with the facts." *Code of Civil Procedure*, § 525, subd. 2.

AGENT OR ATTORNEY. The verification may be made by the agent or the attorney for the party:

1. "Where the party is a foreign corporation; or

2. "Where the party is not within the county where the attorney resides, or if the latter is not a resident of the State, the county where he has his office, and capable of making the affidavit; or

3. "If there are two or more parties united in interest and pleading together, where neither of them acquainted with the facts is within that county and capable of making the affidavit; or

4. "Where the action or defense is founded upon a written instrument for the payment of money only, which is in the possession of the agent or attorney; or

5. "Where all the material allegations are within the personal knowledge of the agent or the attorney." *Code of Civil Procedure*, § 525, subd. 3.

The verification may, in all cases, be by the attorney or an agent where the party is not within the county where the attorney or the agent resides, or is incapable of making it; even though the attorney or agent does so only in information and belief (Newberger *v.* Webb, 24 *Hun*, 347; Lefevre *v.* Latson, 5 *Sandf.* 650; S. C., 10 *N. Y. Leg. Obs.* 246; Stannard *v.* Mattice, 7 *How. Pr.* 4; qualifying Hunt *v.* Meacham, 6 *Id.* 400; which is to the contrary. To the same effect, Roscoe *v.* Maison, 7 *Id.* 121; Smith *v.* Rosenthall, 11 *Id.* 442; Wilkin *v.* Gilman, 13 *Id.* 225; Dixwell *v.* Wordsworth, 2 *Code R.* 1; Boston Locomotive Works *v.* Wright, 15 *How. Pr.* 353); or, being an answer, denies any knowledge or information sufficient to form a belief (Newberger *v.* Webb, *supra*), and it may also be by the attorney or agent whether the party is within the county or not, when the action or defense is founded on a written instrument for payment of money only, and such instrument is in possession of the attorney or agent, or where all the material allegations of the pleading are within the personal knowledge of the attorney or agent. Stannard *v.*

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Note on the Verification of Pleadings.

Mattice, 7 *How. Pr.* 4; Roscoe v. Maison, 7 *Id.* 121; Treadwell v. Fassett, 10 *Id.* 184; Lefevre v. Latson, 5 *Sandf.* 650; People v. Allen, 14 *How. Pr.* 334; Boston Locomotive Works v. Wright, 15 *Id.* 253; Bank of Wooster v. Spencer, *Clarke*, 386; Bank of Orleans v. Skinner, 9 *Paige*, 305; Sizer v. Miller, 9 *Id.* 605; Wheeler v. Chesley, 14 *Abb. Pr.* 441; Meyers v. Gerrits, 13 *Id.* 106.

The fact that an attorney cannot find his client within the city will not make a verification of a pleading by him sufficient. Lyons v. Murat, 54 *How. Pr.* 28.

An attorney may verify a pleading in behalf of his non-resident client, although it appears that the client has a resident agent, and it is through him that the attorney has obtained his information. Drevert v. Appsert, 2 *Abb. Pr.* 165.

Where a party has more than one agent, it is not imperative that the agent who knows most about the matters should make the verification. Drevert v. Appsert, 2 *Abb. Pr.* 165.

The mere fact that a person is agent for another, for some purpose, will not qualify such agent to verify all complaints or answers for his principal. The character of an agency that will qualify an agent to verify a pleading in an action not founded upon an instrument for the payment of money must be such as would ordinarily bring all the material allegations of the pleading within his personal knowledge. He must have acted as a substitute for his principal in the transaction in question, and have derived his knowledge of the truth of the allegations of the pleadings by having been a party in fact to the matters in controversy. Boston Locomotive Works v. Wright, 15 *How. Pr.* 253.

The managing agent of a foreign corporation having charge of all its business here, and on whom the process in the action was served, may verify its answer as an officer of the corporation, and without stating the grounds of his belief. Glaubensklee v. Hamburg & American Packet Co., 9 *Abb. Pr.* 104.

In an action upon an instrument for the payment of money only, the possession of the instrument is enough to authorize the agent or attorney of the plaintiff to verify (Smith v. Rosenthall, 11 *How. Pr.* 442; Meyers v. Gerrits, 13 *Abb. Pr.* 106; Treadwell v. Fassett, 10 *How. Pr.* 184; Mason v. Brown, 6 *Id.* 481), and it is not necessary in such a case that the material allegations be within the personal knowledge of the agent or attorney. *Id.*

When an attorney verifies an answer in the absence of his client from the county, and it gives the attorney the right to make such an answer as the defendant could not make if he himself were to swear to the pleading, the court must look to it that the attorney seeks his

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information in the proper quarter, and that the information on which he relies comes either from the defendant himself, or from some one in the position to know the facts better than the defendant. Stedeker *v.* Taft & Sharp, 4 *N. Y. Law Bull.* 88.

Form of Verification.

"The affidavit of verification must be to the effect, that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true." *Code of Civil Procedure*, § 526.

It is not necessary to literally follow the form of verification given in the Code (Radway *v.* Mather, 5 *Sandf.* 655; *In re* Macaulay, 94 *N. Y.* 574; Sexauer *v.* Bowen, 10 *Abb. Pr. N. S.* 335; Southworth *v.* Curtis, 6 *How. Pr.* 271); but the statute must, as to everything material, be strictly followed. Waggoner *v.* Brown, 8 *How. Pr.* 212; Tiballs *v.* Selfridge, 12 *Id.* 64; and see Williams *v.* Riel, 11 *Id.* 374; S. C., 5 *Duer*, 501; Van Horn *v.* Montgomery, 5 *How. Pr.* 238.

The verification is insufficient when, instead of saying that "it is true *of his own knowledge*," the affiant states that it is true to the best of his knowledge and belief (Van Horn *v.* Montgomery, 5 *How. Pr.* 238), or that it is substantially true. Waggoner *v.* Brown, 5 *How. Pr.* 212.

A verification stating that the affiant "knows the contents thereof, and that the same are true," is equivalent to saying that they are true to the knowledge of deponent, and is therefore sufficient. *In re* Macaulay, 94 *N. Y.* 574; Southworth *v.* Curtis, 6 *How. Pr.* 271. *Contra*, Williams *v.* Reil, 11 *How. Pr.* 374; S. C., 5 *Duer*, 501; Tibbals *v.* Selfridge, 12 *How. Pr.* 64. Sexauer *v.* Bowen, 10 *Abb. N. S.* 335; S. C., 3 *Daly*, 405.

Putting verification in past tense, and stating that the "facts" were true instead of "matters," has been held sufficient. Whelpley *v.* Van Epps, 9 *Paige*, 332.

Where a pleading alleges nothing on information and belief of the party, the verification may be that it is true to his knowledge, without adding "except as to the matters therein stated on information." Kinkaid *v.* Kipp, 1 *Duer*, 692; S C., 11 *N. Y. Leg. Obs.* 313; Ross *v.* Longmuir, 15 *Abb. Pr.* 326; Radway *v.* Mather, 5 *Sandf.* 654; Harnes *v.* Tripp, 4 *Abb. Pr.* 232; Ladue *v.* Andrews, 54 *How. Pr.* 160.

Under the present Code (§ 524), a verification that states that the allegations "are true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true," is to be regarded as a verification upon the parties own knowledge, and the phrase beginning with the word

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"except" is mere surplusage and do not impair the force of the verification. Ladue *v.* Andrews, 54 *How. Pr.* 160; Boughen *v.* Nolen, 5 *N. Y. Weekly Dig.* 100.

Where all the allegations are made upon information and belief, the verification may be that the affiant "believes it to be true." Harnes *v.* Tripp, 4 *Abb. Pr.* 232; Radway *v.* Mather, 5 *Sandf.* 654.

A verification to a pleading which simply states that it is true as affiant is informed and believes, is in a case where all the allegations therein are upon information and belief, a sufficient verification. Orvis *v.* Goldschmidt, 2 *N. Y. Civ. Pro.* 314.

Where several persons verify the same pleading, it is proper to say, these defendants severally say, each for himself, that he has, &c.; other equivalent words are sufficient. Kinkaid *v.* Kipp, 1 *Duer*, 692; S. C., 11 *N. Y. Leg. Obs.* 313.

STATING GROUNDS OF BELIEF, ETC. Where the verification "is made by a person, other than the party, he must set forth, in the affidavit, the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why it is not made by the party." *Code of Civ. Pro.* § 526.

The corresponding provision of the Code of Procedure, section 157, was: "When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief, on the subject, and the reason why it is not made by the party." Under this statute it was held in several cases, that whenever the pleading was verified by one not a party, besides stating why it was not made by the party (Fitch *v.* Bigelow, 5 *How. Pr.* 237), it should specifically set forth the deponent's knowledge of each material fact, or the grounds of his belief; and, so far as he speaks of his own knowledge, he must state what knowledge he has; and when he speaks of his belief, he must state the sources of his information, as well as the grounds of his belief. Hubbard *v.* Natl. Protective Ins. Co., 11 *How. Pr.* 149; Stannard *v.* Mattice, 7 *How. Pr.* 4; Fitch *v.* Bigelow, 5 *Id.* 237; Treadwell *v.* Fassett, 10 *Id.* 184; People *v.* Allen, 14 *Id.* 334; Bank of State of Maine *v.* Buel, 14 *Id.* 311; Boston Locomotive Works *v.* Wright, 15 *Id.* 253; Soutter *v.* Mather, 14 *Abb. Pr.* 440); and this, notwithstanding that the action is on a written instrument for the payment of money only, which is in the possession of the attorney verifying. Tredwell *v.* Fassett, 10 *How. Pr.* 184; Hubbard *v.* National Protection Ins. Co., 11 *Id.* 149; Meads *v.* Gleason, 13 *Id.* 309; contrary (citing Stannard *v.* Mattice, 7 *How. Pr.* 4; Lefevre *v.* Latson, 5 *Sandf.* 650); Smith *v.* Rosenthall, 11 *How. Pr.* 442; Mason *v.* Brown, 6 *How. Pr.* 481; Myers *v.* Gerrits, 13 *Abb. Pr.* 106.

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Note on the Verification of Pleadings.

Later decisions, however, held that such verification need not set forth the knowledge or grounds of belief, if all the allegations of the pleading were expressed in a positive form. Ross *v.* Longmuir, 15 *Abb. Pr.* 326.

It is not necessary that an attorney or agent verifying a pleading should have knowledge of the allegations therein; they may be stated and verified upon information and belief, although the action is not founded on a written instrument. Stannard *v.* Mattice, 7 *How. Pr.* 4, distinguishing Hunt *v.* Meacham, 6 *Id.* 400.

For examples of affidavits of verification made by attorneys, held sufficient under the old Code, see Mason *v.* Brown, 6 *How. Pr.* 481; Stannard *v.* Mattice, 7 *Id.* 4; Smith *v.* Rosenthall, 11 *Id.* 442; Lefevre *v.* Latson, 5 *Sandf.* 650; Myers *v.* Gerrits, 13 *Abb. Pr.* 106; Ross *v.* Longmuir, 15 *Id.* 326; S. C., 24 *How. Pr.* 49; Gourney *v.* Wersuland, 3 *Duer*, 613; Wilkins *v.* Gilman, 13 *How. Pr.* 225; Wheeler *v.* Chesley, 14 *Abb. Pr.* 441.

For examples of such affidavits held insufficient under the old Code, see Treadwell *v.* Fassett, 10 *How. Pr.* 184; Hunt *v.* Meacham, 6 *Id.* 400; Hubbard *v.* Natl. Protection Ins. Co., 11 *Id.* 149; Meads *v.* Gleason, 13 *Id.* 309; Tibbals *v.* Selfridge, 12 *Id.* 64; Soutter *v.* Mather, 14 *Abb. Pr.* 440; Bank of State of Maine *v.* Buel, 14 *How. Pr.* 311; People *ex rel.* Smith *v.* Allen, 14 *Id.* 334; Boston Locomotive Works *v.* Wright, 15 *Id.* 253.

Where, in an action against a domestic corporation, the answer is verified by its secretary, and the verification was in the usual form of a verification by a party,—*Held*, that this verification was sufficient; that it was the verification of the corporation, and a verification by a party; that it is only agents or attorneys that are required when verifying pleadings to set forth the grounds of their belief as to all of the matters not stated upon their knowledge, and the reason why the verification is not made by the party. Glaubensklee *v.* Hamburgh & American Steam Packet Co., 9 *Abb. Pr.* 104, followed; Am. Ins. Co. *v.* Banker, &c. Co., 7 *N. Y. Civ. Pro.* 443.

Taken without the State. Where a complaint sworn to without this State was not certified in the manner required to entitle a deed so acknowledged to be recorded in this State,—*Held*, that it was to be regarded as unverified. Phelps *v* Phelps, 6 *N. Y. Civ. Pro.* 117. To same effect, Williamson *v.* Williamson, 3 *Id.* 69; Lahens *v.* Fielden, 1 *Barb.* 22. See also, Williams *v.* Waddell, 5 *Id.* 101; Harris *v.* Durkee, 5 *Id.* 376; *Code Civ. Pro.* § 528.

Sworn to before Attorney. A party cannot verify a pleading before his own attorney, but may do so before the clerk or law partner of his attorney, or before counsel. Gilmore *v.* Hempstead, 4 *How. Pr.*

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153; Anonymous, 4 *Id.* 290, and see Taylor *v.* Hatch, 12 *Johns.* 340; Hallenback *v.* Whitaker, 17 *Id.* 2; People *v.* Spalding, 2 *Paige*, 326.

Defective Verification.

"The remedy for a defective verification of a pleading is to treat the same as an unverified pleading. Where the copy of a pleading is served without a copy of a sufficient verification, in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice, with due diligence to the attorney of the adverse party, that he elects so to do." *Code of Civil Procedure*, § 528.

Delay in taking advantage of a defect in a verification waives it. Hull *v.* Ball, 14 *How. Pr.* 305; White *v.* Cummings, 3 *Sandf.* 716; Wilson *v.* Bennett, 2 *N. Y. Civ. Pro.* 34; Fulton Bank *v.* Beach, 6 *Wend.* 36.

Objection cannot be taken at the trial to the verification of the pleadings. Schwatz *v.* Oppold, 74 *N. Y.* 307; Katz *v.* Kuhn, 9 *Reporter*, 632.

Where a verification is necessary, and an unverified or defectively verified copy of a pleading is served, the better practice is to return it promptly, pointing out the objection, and then to proceed as though none had been served. Wilkin *v.* Gilmore, 13 *How. Pr.* 225; White *v.* Cummings, 3 *Sandf.* 716; Stout *v.* Curran, 7 *How. Pr.* 36; Hull *v.* Ball, 14 *Id.* 305; Sexaner *v.* Bowen, 3 *Daly*, 405; S. C., 10 *Abb. Pr. N. S.* 335.

A notice that an answer is returned because it is not sufficiently verified, is not specific enough; the defect should be pointed out. Snape *v.* Gilbert, 13 *Hun*, 494.

Where several defendants not united in interest join in an answer and only one verifies it, it is good as to that one, and cannot be returned, but the plaintiff should give notice that he requires an answer verified by all the defendants. Hull *v.* Ball, 14 *How. Pr.* 305.

The sufficiency of a verification to an answer which should be verified, could, under the old Code, be tested by a motion for judgment as for want of an answer. Moloney *v.* Dows, 2 *Hilt.* 247; aff'g S. C., *sub nom.* Maloney *v.* Dows, 15 *How. Pr.* 161; Hull *v.* Ball, 14 *Id.* 305.

A defect in the verification of a complaint, rendering the verification a nullity merely relieves the defendant from the necessity of answering under oath. Quin *v.* Tilton, 2 *Duer*, 648. Such a defect does not render it demurrable. Webb *v.* Clark, 2 *Sandf.* 647; S. C., 2 *Code R.* 16.

A defect in the verification of the complaint furnishes no ground for setting aside the pleading. Fitch *v.* Bigelow, 5 *How. Pr.* 237;

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Waggoner v. Brown, 8 *Id.* 212; Strauss v. Parker, 9 *Id.* 342; Williams v. Riel, 11 *Id.* 374; and see Van Horne v. Montgomery, 5 *Id.* 238.

If the defect be latent,—*e. g.*, that the officer taking the affidavit is disqualified,—a motion to set aside is necessary. Gilmore v. Hempstead, 4 *How. Pr.* 153; and see Van Horne v. Montgomery, 5 *Id.* 238.

Where a question arises as to whether a pleading has been made and served according to law, as whether an unverified answer is proper, it should be decided by a motion to strike it out in case it has not been served or to compel its acceptance in case of refusal to receive it. The court has no discretion to suspend the decision. Fredericks v. Taylor, 52 *N. Y.* 596; S. C., 14 *Abb. Pr. N. S.* 77.

Where the venue of the verification is omitted, defendant is not bound to return the complaint, but may answer without verifying. Lane v. Morse, 6 *How. Pr.* 394.

Where the verification of a complaint is defective, defendant's answer may be unverified. Waggoner v. Brown, 8 *How. Pr.* 212; Treadwell v. Fassett, 10 *Id.* 184; Meads v. Gleason, 13 *Id* 309; Bank of State of Maine v. Buel, 14 *Id.* 334; Hubbard v. Nat'l Protection Ins. Co., 11 *Id.* 149. To similar effect, People v. Allen, 14 *Id.* 334. To the contrary, Broadway Bank v. Danforth, 7 *Id.* 264. See also, Tibbals v. Selfridge, 12 *Id.* 64.

McADAM, ET AL., v. WALBRAU.

SUPREME COURT, FOURTH DEPARTMENT, ONEIDA COUNTY, SPECIAL TERM, FEBRUARY, 1886.

§§ 421, 723, 1693, 1695.

Replevin.—Demand.—When proceeding defective because demand not made before affidavit on which requisition is based was sworn to. —Amendment.—Effect of general appearance.

Where, in an action to recover a chattel in which a demand was necessary before bringing the action, it appeared that the affidavit on which a requisition to the sheriff to take the property was based, although stating that the property had been demanded, was sworn to before a demand was actually made,—*Held*, that the replevin proceedings were defective, and liable to be set aside; that they were amendable, and a demand having actually been made before the papers were served by the sheriff, although after the affidavit

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was sworn to, the defect could be cured by the filing, by way of amendments, affidavits showing such demand.

Woodcock *v.* Roberts (66 *Barb.* 500), approved and followed.

A defendant, who, in response to the summons in an action, appears generally therein, does not thereby waive defects in replevin proceedings theretofore taken in the action.

Roberts *v.* Willard (1 *Code R.* 100); Hyde *v.* Patterson (1 *Abb. Pr.* 248), explained and not followed.

(*Decided February* 13, 1886.)

Motion by defendant to set aside proceedings in replevin, on the ground that a demand was necessary before the plaintiffs could bring their action, and that the affidavit upon which the requisition to the sheriff was based, although it stated that a demand had been made, was made before the demand actually took place.

L. E. Goodier, for defendant and motion.

W. T. Dunmore, for plaintiffs, opposed.

MERWIN, J.—Upon the papers before me, I must assume that a demand was in fact made before the sheriff took the property, but it was not made before the affidavit was sworn to. Therefore, within the view expressed by Justice MULLIN in Woodcock *v.* Roberts (66 *Barb.* 500), the proceedings were defective, and liable to be set aside. I am inclined to concur in the view of Judge MULLIN, as it would not be a good rule in practice to allow affidavits to be untruly made, though under the expectation of something being done afterward to make them true.

But it is said that as the defendant has appeared generally in the action, this defect is waived. The suit is commenced by the service of the summons; That is distinct from the replevin proceeding; the latter may be taken or not, as the plaintiff may choose. When, therefore, the defendant, in response to the summons, appears in the action, he does not, I think,

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in any way recognize the validity of the replevin papers. Whether the latter are good or not, the action goes on. If, as under the old practice (*Graham Prac.* 888), the action was commenced by writ of replevin, then a general appearance might waive anything going to the invalidity of the writ, and that idea was very likely in the mind of the court in some early cases on the subject (1 *Code R.* 100; Hyde *v.* Patterson, 1 *Abb. Pr.* 248). I am of the opinion that appearance does not waive the defect. It is, however, amendable (Depew *v.* Leal, 2 *Abb. Pr.* 131, and cases cited), and affidavits by way of amendment can be used in opposition to the motion to set aside. This is on the basis that at the time the sheriff served the papers, a demand had in fact been made. The facts then existed which authorized the proceeding, although they did not exist when the affidavit was made. This privilege of amendment given to the plaintiffs, carries with it the right to the defendant to have costs of this motion.

An order may be entered allowing the plaintiffs to file by way of amendment the affidavits used by them on this motion, and that thereupon the motion be dismissed, but with $10 costs of motion to the defendant.

ESTATE OF TAYLOR, DECEASED.

SURROGATES' COURT, KINGS COUNTY, DECEMBER, 1885.

§§ 1380 *et seq.*, 2561.

Leave to issue execution.—Costs on granting application for.

An application to a surrogate's court for leave to issue an execution on a judgment recovered against a decedent in his life time, made pursuant to sections 1380 *et seq.* of the Code of Civil Procedure is a

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special proceeding and not a motion, and the petitioner, if successful, is entitled to $70 costs if the application was contested, and to $25 costs if it was not.

(*Decided December* 17, 1885.)

Application for settlement of amount of costs to which the petitioner in proceedings for leave to issue execution is entitled.

H. G. Batcheller, for petitioner.

W. L. Whiting, for administrator.

Deming & Hubbell, for next of kin.

LOTT, Surrogate.—Leave to issue execution is by surrogate's decree (*Code of Civil Procedure*, §§ 1380, 1381). The application is therefore a special proceeding, and not a motion which is determined by an order (§ 2556). If the petitioner's application for leave to issue execution was contested, his bill is right; if not, he is entitled to $25 instead of the item of $70 (§ 2561).

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ERRATUM.

On page 198, ninth line from bottom, insert "not" between words "is" and "to be."

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